

# CITY COUNCIL REPORT



Meeting Date: June 9, 2026  
 General Plan Element: ***Economic Vitality***  
 General Plan Goal: ***Encourage high quality retail and entertainment***

## ACTION

**Authorize a new Revocable Outdoor Dining License Agreement.** Adopt Resolution 13672 authorizing a new Revocable Outdoor Dining License Agreement with 5<sup>th</sup> Avenue Scottsdale LLC ("Licensee") Contract No. 2026-069-COS, for an outdoor dining patio in City right of way.

## BACKGROUND

The purpose of this action is to approve a new Revocable Outdoor Dining License Agreement ("Agreement") with 5<sup>th</sup> Avenue Scottsdale LLC on City property. The license area consists of two separate patio areas (on both the south and east sides of the business) totaling approximately 464 square feet. The new patio areas were approved through the City Planning & Development Department.

This outdoor dining license will not impact any on-street parking spaces or existing sidewalks. Historically, the City has supported outdoor dining activities to energize downtown areas.

## ANALYSIS & ASSESSMENT

### Recent Staff Action

The patio locations will not impact access to, or operation of, pedestrian movement along 5<sup>th</sup> Avenue and Scottsdale Road. The terms of the License Agreement are similar to other outdoor dining license agreements within the downtown area, and include the following provisions:

- A five-year license, with 2 additional 5-yr extensions options.
- Either party may cancel the license with a 30-day written notice.
- The base use fee will be \$4537.92 a year with an annual 3% escalation each July thereafter beginning on July 1, 2027.

## RESOURCE IMPACTS

### Available funding

No City funding is required as a result of this action.

### Staffing, Workload Impact

The Agreement will be administered by existing Transportation & Infrastructure Real Estate staff. The Licensee is responsible for all maintenance and operational costs of the outdoor dining areas.

Action Taken \_\_\_\_\_

**Maintenance Requirements**

No significant maintenance requirements will result from this action. Minor upkeep of the adjacent landscaping and patio area is the responsibility of the property owner.

**OPTIONS & STAFF RECOMMENDATION**

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**Recommended Approach**

Adopt Resolution 13672 authorizing Revocable Outdoor Dining License Agreement, city Contract No. 2026-069-COS for an outdoor dining patio.

**Proposed Next Steps**

If Council adopts Resolution 13672, Staff will finalize the agreement with Licensee and collect the first year's use fee.

**Responsible Department(s)**

Transportation & Infrastructure, Real Estate Services

**STAFF CONTACTS (S)**

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Maria Muiser, Real Estate Asset Manager, (480) 312-7853 [MMuiser@scottsdaleaz.gov](mailto:MMuiser@scottsdaleaz.gov)

Alicia Gallardo, Real Estate Management Specialist, (480) 312-7692 [AGallardo@scottsdaleaz.gov](mailto:AGallardo@scottsdaleaz.gov)

**APPROVED BY**

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*Alison Tymkiw*

\_\_\_\_\_  
Alison Tymkiw, Senior Director-City Engineer,  
Transportation & Infrastructure  
(480) 312-7760, [atymkiw@scottsdaleaz.gov](mailto:atymkiw@scottsdaleaz.gov)

\_\_\_\_\_  
5/22/26  
Date

**ATTACHMENTS**

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1. Resolution 13672
2. Location Map
3. Contract 2026-069-COS

RESOLUTION NO. 13672

A RESOLUTION OF THE COUNCIL OF THE CITY OF SCOTTSDALE,  
MARICOPA COUNTY, ARIZONA AUTHORIZING A REVOCABLE  
OUTDOOR DINING LICENSE AGREEMENT ON CITY OWNED PROPERTY.

WHEREAS, Scottsdale's downtown is an important community asset providing significant economic, tourism and cultural amenities for Scottsdale's citizens, businesses and visitors.

WHEREAS, The City of Scottsdale ("City") is committed to maintaining and enhancing downtown to provide these important community benefits.

WHEREAS, Activating public spaces through outdoor dining patios and similar amenities increases the attractiveness of downtown to tourists and otherwise advances the prosperity of downtown and the broader community.

WHEREAS, Including such projects as part of downtown provides the potential for visitors to better experience the community and its amenities and heritage.

WHEREAS, City owns land interest or use rights surrounding the property located on the north side of 5<sup>th</sup> Avenue and the west side of Scottsdale Road that is suitable for an outdoor dining patio (the "Use Area")

WHEREAS, 5<sup>th</sup> Avenue Scottsdale, LLC, an Arizona limited liability company (the "Licensee"), is the owner of an adjacent restaurant parcel at 7158 E. 5<sup>th</sup> Avenue (the "Licensee's Parcel").

BE IT RESOLVED by the Council of the City of Scottsdale as follows:

Section 1. The City Council hereby authorizes and directs the Mayor to execute on behalf of the City of Scottsdale, the Outdoor Dining License Agreement No. 2026-069-COS with 5<sup>th</sup> Avenue Scottsdale, LLC an Arizona limited liability company.

**PASSED AND ADOPTED** by the City Council of the City of Scottsdale this \_\_\_\_\_  
day of \_\_\_\_\_, 2026.

**ATTEST:**

**CITY OF SCOTTSDALE,**  
an Arizona municipal corporation

\_\_\_\_\_  
Ben Lane, City Clerk

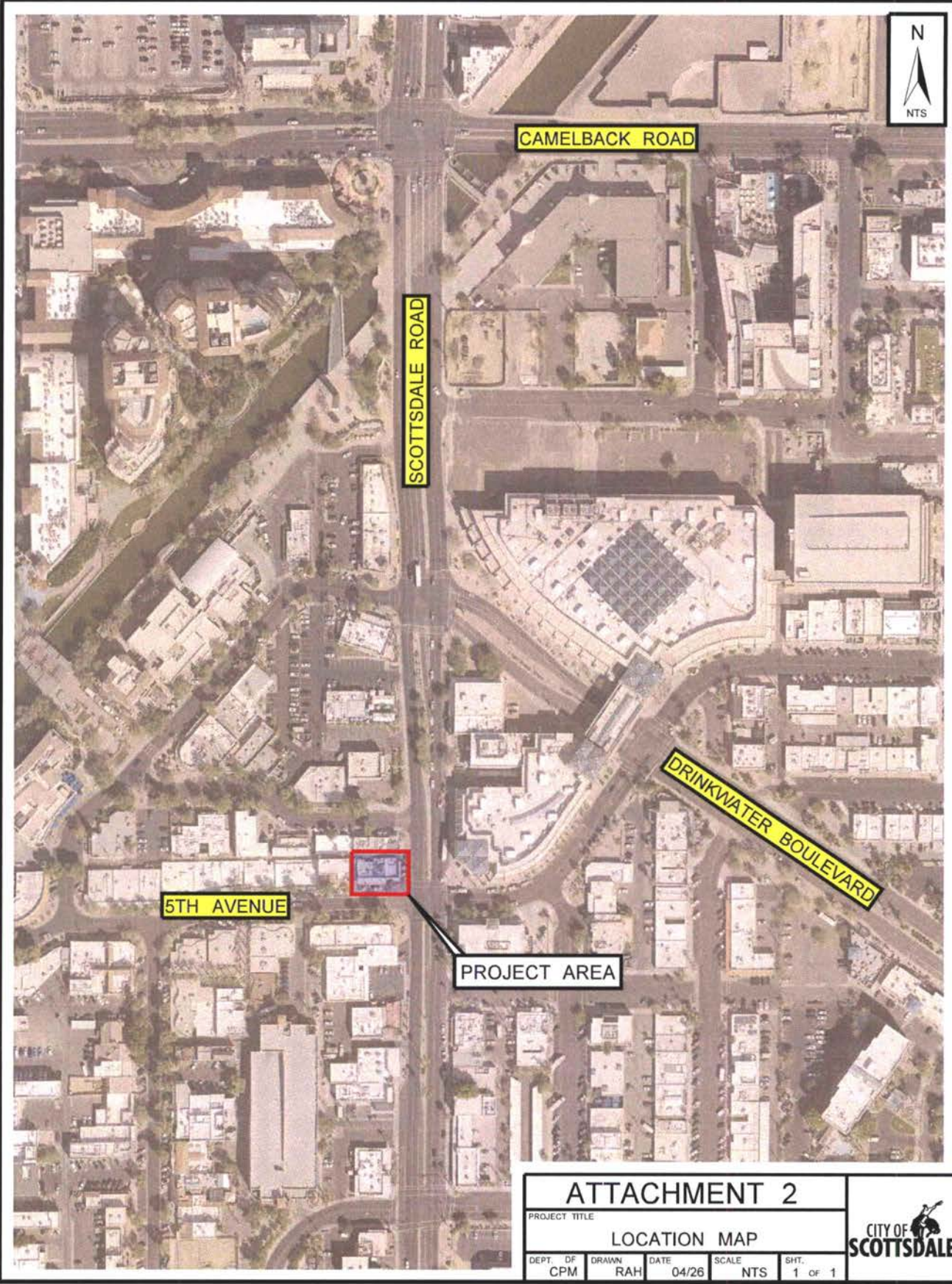
\_\_\_\_\_  
Lisa Borowsky, Mayor

**APPROVED AS TO FORM:**

**OFFICE OF THE CITY ATTORNEY**

A handwritten signature in black ink, appearing to read "Joe Padilla", is written over a horizontal line.

Luis E. Santaella, City Attorney  
By: Joe Padilla, Deputy City Attorney



ATTACHMENT 2					
PROJECT TITLE					
LOCATION MAP					
DEPT. DF	DRAWN	DATE	SCALE	SHT.	
CPM	RAH	04/26	NTS	1 OF 1	



WHEN RECORDED RETURN TO:

CITY OF SCOTTSDALE  
Attn: Real Estate Services  
7447 East Indian School Road, Suite 205  
Scottsdale, AZ 85251

City of Scottsdale Agreement No. 2026-069-COS  
Resolution No. 13672  
Licensee's Parcel Address: 7158 E. 5<sup>th</sup> Avenue

## OUTDOOR DINING REVOCABLE LICENSE AGREEMENT

This OUTDOOR DINING REVOCABLE LICENSE AGREEMENT (the "**Agreement**") is made and entered into this \_\_\_\_ day of \_\_\_\_\_ 2026 (the "**Effective Date**") by and between the City of Scottsdale, an Arizona municipal corporation (the "**City**"), and 5<sup>th</sup> Avenue Scottsdale, LLC, an Arizona limited liability company ("**Licensee**"). The City and the Licensee may each be referred to in this Agreement individually as a "**Party**" or collectively as the "**Parties**."

### RECITALS

A. Pursuant to the Scottsdale City Charter, the Scottsdale Revised Code, and other state and federal laws, the City is empowered to regulate its streets, alleys, public easements, and other City-owned property and to grant, renew, deny, amend, and terminate licenses for, and otherwise regulate the installation of, outdoor patios located on property owned or controlled by the City.

B. City retains real property interests in certain real property comprising approximately Four Hundred Sixty-Four (464) square feet of land which is legally described and depicted on **Exhibit A** attached hereto (the "**Use Area**").

C. Licensee owns a certain existing building (the "**Licensee's Building**") located upon certain land (the "**Licensee's Parcel**") which are described on **Exhibit B** attached hereto. The Licensee's Parcel is located at 7158 E. 5<sup>th</sup> Avenue, Scottsdale, AZ and identifiable as of the Effective Date as APN 173-50-101B. Licensee warrants and represents that Licensee owns fee title to Licensee's Parcel and Licensee's Building.

D. Licensee desires to use the Use Area solely for service of food and beverages (including alcohol) that have been prepared in Licensee's Building and will be immediately consumed by guests in and on the Use Area (the "**Permitted Use**").

E. City desires to reserve rights to construct and use additional improvements upon the Use Area subject to the requirements of this Agreement.

NOW, THEREFORE, for and in consideration of the foregoing, the amounts hereinafter to be paid by Licensee, and the covenants and agreements contained herein to be kept and performed by Licensee, and other good and valuable consideration, City and Licensee agree as follows:

## TERMS

### ARTICLE 1. USE

- 1.1. Incorporation of Recitals. The Recitals above and any and all Exhibits referenced within are incorporated herein by reference.
- 1.2. Grant of License. City hereby grants to Licensee a non-exclusive, revocable license to use the Use Area for the Permitted Use conditioned upon Licensee's full, timely, complete, and faithful performance of all terms and conditions of this Agreement by Licensee, and Licensee hereby accepts the license and this Agreement.
- 1.3. Permitted Use. Licensee shall only use the Use Area for the service of food and beverages (including alcohol) that have been prepared in Licensee's Building and that will immediately be consumed by guests in the Use Area. No other activity shall be conducted at or from the Use Area.
- 1.4. Use Restrictions. Licensee shall conform and shall cause its customers, employees, workers, and other persons using the Use Area pursuant to this Agreement to conform to the Permitted Use and any restrictions outlined herein. The Permitted Use is restricted as follows:
  - 1.4.1. Cooking. No Cooking or food preparation is allowed in the Use Area.
  - 1.4.2. Restaurant Operation Required. Licensee shall only use the Use Area in connection with and as an integral part of a full-service, sit-down restaurant within Licensee's Building, with a menu and under a manager and/or operator of the Licensee's Building. Licensee shall operate Licensee's restaurant within Licensee's Building as a restaurant and not as a bar or other type of establishment. For purposes of this Agreement, a restaurant is defined as an establishment that either offers only food and no alcohol without conditions or offers both food and alcohol with the following conditions:
    - 1.4.2.1. The restaurant has in-operation, on-site, full-service kitchen within the Licensee's Building that is used to prepare and cook (and not just heat or warm) entrees ordered by individual customers.
    - 1.4.2.2. When the kitchen is open, the restaurant's main menu offers at least ten (10) different food entrees. Upon request by the City, Licensee shall provide a copy of the main menu.
  - 1.4.3. Animals. Licensee shall allow in the Use Area service animals and emotional support animals as required by the American with Disabilities Act. Pets on leashes are also permitted if allowed by applicable laws and regulations.
  - 1.4.4. Time Restrictions. All activities at the Use Area must start no earlier and conclude no later than allowed by law. Licensee shall not use the Use Area outside the

general operation hours permitted by law, special permit or any city imposed operating time restrictions.

- 1.4.5. Noise. Except as City may specifically allow from time to time under an approved Special Event or Conditional Use Permit, outdoor music and sound equipment, sources, and devices that intentionally emit sound (except for safety alarms) are prohibited at the Use Area.
- 1.5. Video Equipment. Licensee shall not use televisions, computer monitors, video screens, video displays, video projectors, or other equipment for displaying video images, signals, or patterns at the Use Area. City may elect to temporarily suspend this paragraph in whole or in part from time to time subject to such conditions or requirements as City may desire from time to time under an approved Special Event or Conditional Use Permit.
- 1.6. Liquor License. Any liquor license that Licensee holds at the Use Area shall be limited to the Use Area and the Licensee's Building. This Agreement does not create in Licensee any rights with respect to alcohol service outside the Use Area. Upon termination of this Agreement for any reason, Licensee shall cause the Use Area to be removed from the scope of its liquor license. Licensee shall cause all alcohol served at the Use Area to be consumed inside the required barrier at the Use Area or inside Licensee's Building.
- 1.7. Standards of Service. In entering into this Agreement, City and Licensee have foremost in mind providing the public food and beverage services and facilities of the highest quality. Without limitation, Licensee shall operate the Use Area in a first-rate manner.
- 1.8. Security. Except as City may specifically allow from time-to-time, Licensee shall require at least the following level of staffing and expertise for the Permitted Use at the Use Area:
  - 1.8.1. If City requests, Licensee shall hire one or more security guards for the Use Area with such qualifications as City may reasonably request.
  - 1.8.2. Licensee's outdoor security efforts shall equal or exceed Licensee's security efforts inside Licensee's Building.
  - 1.8.3. Licensee shall be responsible for all aspects of security and safety at the Use Area regardless of whether City influences or participates in Licensee's security or safety programs.
- 1.9. Conduct at Use Area. Noisy, unruly, inebriated, disorderly, lewd, adult oriented behavior or other unlawful conduct of any description at the Use Area and Licensee's Parcel is strictly prohibited.
- 1.10. Common Areas. Subject to current and future regulations and policies governing the use of, and access to, the Use Area, Licensee, its officers, employees, agents, patrons and invitees, and its suppliers of services and furnishers of materials shall have the right of ingress to and egress from the Use Area through such portions of the Adjacent City Property as are open to the public for that purpose from time to time. Such right is strictly limited to ingress and egress.

- 1.11. Adjacent City Property Operations. Licensee acknowledges that Licensee's use of the Use Area shall be subject and subordinate to use of the Adjacent City Property. Licensee's use of the Use Area shall not be permitted by Licensee to in any way adversely affect City's use or operation of the Adjacent City Property.
- 1.11.1. Obstructing Traffic. Licensee and its customers shall not obstruct or interfere with the use of the Adjacent City Property including without limitation any walkways, sidewalks, driveways, vehicle lanes, or other areas adjacent to the Use Area and shall at all times maintain safe, convenient, and free pedestrian and vehicular access along the Adjacent City Property. City may require that such access includes pedestrian access passing through the Use Area.
- 1.12. Hazardous Materials. Licensee shall not produce, dispose, transport, treat, use or store any hazardous waste or materials or toxic substance upon or about the Use Area or any substance now or hereafter subject to regulation under any law. The preceding sentence does not prohibit use of ordinary janitorial supplies used to clean and maintain the Use Area. Licensee shall pay, indemnify, defend, and hold City harmless against any loss or liability incurred by reason of any Toxic Substance on or affecting the Use Area and the Adjacent City Property occurring after the date of this Agreement and shall immediately notify City of any Toxic Substance at any time discovered or existing upon the Use Area. Licensee understands the hazards presented to persons, property, and the environment by dealing with Toxic Substances. Licensee shall cause any on-site or off-site storage, treatment, transportation, disposal, or other handling of Toxic Substance by Licensee in connection with the Use Area to be performed by persons, equipment, facilities and other resources who are at all times properly and lawfully trained, authorized, licensed, and otherwise permitted to perform such services.
- 1.12.1. Name of Business. Licensee shall operate the Use Area and Licensee's Building under the same name.
- 1.12.2. Prohibited Names. Licensee shall not use in connection with any operations at the Use Area any name that directly or indirectly refers to or contains any part of City's name or otherwise suggests a connection between City and Licensee or Licensee's activities. Licensee shall also not use in connection with its operations at the Use Area any name associated with products or purveyors of any sort of alcohol other than Licensee's own name, if applicable, tobacco, adult entertainment, or gambling related products or services.

## ARTICLE 2. TERM

- 2.1. Term. The original term of this Agreement shall be for a period of five (5) years commencing on the first day of July 1, 2026 (the "**Commencement Date**") and ending on June 30, 2031 (the "**Original Term**").
- 2.2. Renewals. The Original Term may be renewed for up to two (2) additional five (5) year periods, each a "**Renewal Term**", upon mutual written agreement by Contract

Administrator and Licensee. The Original Term and any Renewal Term are collectively referred to herein as the “**Term.**”

- 2.3. Holding Over. If Licensee remains in possession or occupancy of the Use Area after expiration of the Term, such holding over shall operate as a limited renewal or extension of this Agreement from month to month that may be terminated at any time by City upon thirty (30) days’ notice to Licensee or by Licensee upon sixty (60) days’ notice to City. Licensee may remain in holdover status up to six (6) months after which time this License will automatically terminate and may not be renewed.
- 2.4. Termination Rights. Either party shall have the unilateral right to terminate this Agreement for any reason whatsoever or for no reason at any time upon thirty (30) days’ written notice to the other party. If this Agreement is terminated prior to the end of the term, the City will reimburse Licensee a prorated Use Fee for the prepaid balance of the term based on a monthly proration.

### **ARTICLE 3. USE AREA**

- 3.1. Condition of Use Area. Licensee has examined, studied and inspected the Use Area, the Adjacent City Property, and all other property associated with this Agreement and its environs. The Use Area is being made available in an "as is" condition without any express or implied warranties of any kind, including without limitation any warranties or representations as to their condition or fitness for any use. Licensee has obtained such information and professional advice as Licensee has determined to be necessary related to this Agreement, the Use Area, or this transaction.
- 3.2. Rights in Adjacent Property. Without limitation, in the event any public right-of-way or other public or private property at or adjacent to the Use Area is dedicated, abandoned, or otherwise acquired or disposed of by City, such property shall not accrue to this Agreement but shall be City's only.
- 3.3. No Real Property Interest. Notwithstanding any provision hereof to the contrary, and notwithstanding any negotiation, correspondence, course of performance or dealing, or other statements or acts by or between the parties, Licensee’s rights are limited to the Use Area and Licensee’s rights in the Use Area are limited to the specific limited license rights created by this Agreement, which creates only a revocable license in the Use Area. City and Licensee do not by this instrument intend to create a lease, easement, or other real property interest. Licensee shall have no real property interest in the Use Area or the Adjacent City Property.
- 3.4. Reservations. City specifically reserves to itself and excludes from this Agreement a non-exclusive delegable right (the “**Reserved Right**”) over the entire Use Area (including any area that may otherwise be for Licensee’s exclusive use) as follows:
  - 3.4.1. City may use and allow others to use the Use Area and any existing or future improvements upon the Use Area and to construct, open, repair, use, and otherwise deal with all manner of improvements at any location upon the Use Area to the extent such uses and improvements do not, in City's reasonable discretion,

materially and substantially impair Licensee's ability to use the Use Area under the terms of this Agreement. For example, and without limitation, City may construct additional utilities upon the Use Area and may perform work related to traffic conditions; public health, safety or welfare; street abandonment; street or other utility or improvement construction or repair; change or establishment of street grade; and installation or other work relating to sewers, drains, water pipes, power lines, signal lines, transportation facilities, pavement, sidewalks, drainage works, landscaping, utilities, tracks, or any other types of structure, work, or improvements of any description, whether or not included within or related in any manner to any of the foregoing.

- 3.4.2. Neither City nor any agent, contractor or employee of City shall be liable to Licensee, its customers, or third parties for any service disruption or for any other harm caused them or their improvements or personalty due to City' exercise of its rights under this Agreement.
  - 3.4.3. City shall have the unilateral right to modify the entirety of the Use Area and Adjacent City Property from time to time during the Term. City may also unilaterally regulate, reroute, close, and otherwise alter pedestrian and vehicular traffic access to the Use Area and Adjacent City Property and travel within any area of the Use Area and Adjacent City Property without Licensee's consent. The preceding sentence does not allow City to provide less access, if any, to the Licensee's Parcel than City would be required to provide to the Licensee's Parcel under applicable law if City and Licensee had not entered into this Agreement.
  - 3.4.4. Upon City's request to exercise its Reserved Right, Licensee at its expense shall protect, support, disconnect, relocate, and remove Licensee's property and improvements at its own expense upon ten (10) days' notice from City or such shorter notice (or no notice) as City may determine to be practical in the circumstances. Within thirty (30) days after City finishes exercising its Reserved Right, Licensee at Licensee's expense shall replace any item temporarily removed. City may perform any such work not performed by Licensee, and Licensee shall reimburse City for its actual costs of such work.
  - 3.4.5. All new improvements or equipment constructed or installed by City shall be for City's exclusive, delegable use.
  - 3.4.6. Licensee shall actively cooperate with City to facilitate City's exercise of the Reserved Right.
  - 3.4.7. Except in an emergency, entries by City, other public agencies, utility providers and other persons and entities shall be made only after reasonable notice to Licensee.
- 3.5. Prior Contracts and Condition of Title. City does not warrant title to the Use Area or adjacent City property. Licensee is responsible to complete independent research it deems necessary regarding condition of title. Licensee's rights hereunder are subject to all

covenants, conditions, restrictions, easements, agreements, liens, reservations, and encumbrances upon, and all other recorded or unrecorded matters or conditions of title to, regarding the Use Area.

#### ARTICLE 4. USE FEE

- 4.1. Use Fee. Licensee shall pay to City a fixed annual amount (the “**Base Use Fee**”) based on Licensee’s use of the Use Area. The Base Use Fee does not include rental tax or any other amounts or fees required by this Agreement or other local, State, or Federal jurisdictions. Licensee shall pay to City all other amounts required by this Agreement (together, the Base Use Fee and all other amounts are collectively deemed the “**Use Fee**”).
- 4.2. Base Use Fee Amount. The amount of the Base Use Fee per each calendar year shall be Four Thousand, Five Hundred Thirty-Seven Dollars and 92/100 Cents (\$4,537.92).
  - 4.2.1. Prorated First Year Base Use Fee Amount. The amount of the prorated Base Use Fee for the Commencement Date through June 30, 20\_\_ shall be \_\_\_\_\_ N/A \_\_\_\_\_ (\$ \_\_\_\_\_) plus applicable county & city rental taxes.
  - 4.2.2. Holdover Base Use Fee Amount. In the event of a holdover, Licensee shall pay City one-hundred fifty percent (150%) of the Base Use Fee amount that is in effect immediately prior to the holdover commencing.
  - 4.2.3. Holdover Use Fee Payments. Licensee shall pay City one-twelfth (1/12) of the Holdover Base Use Fee Amount on the first day of the first month of the holding over and each month thereafter
- 4.3. Annual Adjustment. The Base Use Fee, including any holdover Base Use Fee, shall be adjusted upward on a fixed basis at a rate of three percent (3.0%) per annum on July 1<sup>st</sup> of each year of this Agreement (the “**Annual Adjustment**”).
- 4.4. Use Fee Amounts Cumulative. All amounts payable by Licensee hereunder or under any tax, assessment, or other existing or future ordinance or other law of the City of Scottsdale or the State of Arizona shall be cumulative and payable in addition to each other payment required hereunder, and such amounts shall not be credited toward, substituted for, or set off against each other in any manner.
- 4.5. Use Fee Payment Schedule. Licensee shall pay City in advance and without demand the Use Fee in two semi-annual installments on or before each June 25<sup>th</sup> and December 25<sup>th</sup> of the Term, except as follows:
  - 4.5.1. First Year Use Fee Payment. Licensee shall pay City the Use Fee for the first partial year of this Agreement no later than fifteen (15) calendar days after the Commencement Date.

4.6. Construction Period Use Fee Credit. A credit (the “**Construction Period Credit**”) shall accrue during a Construction Period as defined in Article 8. The credit for the Construction Period only applies if all the following are true:

4.6.1.1. Licensee has ceased its business operations within the Use Area and/or the Licensee Parcel during city approved construction activities. Licensee’s tables, chairs, and other moveable items (such as umbrellas, planters, tools, supplies, and other items) are not permitted to be located in the Use Area during the Construction Period

4.6.1.2. Construction of the improvements will take no less than 1 year and no more than 2 years to complete. Any extension of construction beyond 2 years must be requested in writing by licensee and approved by City.

4.6.1.3. Licensee is responsible for providing a copy of the Construction Permit and final Permit approval as defined in 8.1.1.3, to the contract administrator to receive the Construction Period Credit.

4.6.2. The Construction Period Credit shall be calculated as follows:

4.6.2.1. The Base Use Fee amount that is in effect at the beginning of the Installment Period in which the Construction Period begins; Divided by three-hundred and sixty-five (365); Divided by two (2). Multiply the result by the number of full consecutive days in the Construction Period.

4.6.3. Construction Period Credit Example: Annual installment of \$9,000.00 and a Construction Period of 450 days:  $\$9,000 \div 365 \div 2 \times 450 = \$5,547.95$ .

4.6.4. Licensee shall qualify for the Construction Period credit upon final city approval of the construction. The Construction Period Credit shall be applied to Licensee’s Account.

4.7. Dark Period Use Fee Credit. A credit (the “**Dark Period Credit**”) against the Base Use Fee shall accrue during certain periods when Licensee temporarily ceases using the Use Area as follows:

4.7.1. A Dark Period occurs only if all of the following are true:

4.7.1.1. All business operations on the Use Area and/or Licensee’s Parcel completely cease for not less than sixty (60) consecutive calendar days and not more than three hundred and sixty-five (365) consecutive calendar days. Complete cessation of business operations means that no business of any kind is being conducted and that the Use Area is completely vacant of Licensee’s tables, chairs, and other moveable items (such as umbrellas, planters, tools, supplies, and other items).

4.7.1.2. Any Dark Period beyond three hundred and sixty-five (365) days shall result in automatic termination of this Agreement, and Licensee shall be

required to remove all improvements and personal property in accordance with Article 11 of this Agreement.

4.7.1.3. Licensee gives City written notice of the beginning of a Dark Period a minimum of ten (10) days before the Dark Period begins and immediately upon the End of the Dark Period.

4.7.2. Dark Period Credit amount shall be calculated as follows:

4.7.2.1. The Base Use Fee amount that is in effect at the beginning of the Installment Period in which the Dark Period begins; Divided by three-hundred and sixty-five (365); Divided by two (2). Multiply the result by the number of full consecutive days in the Dark Period.

4.7.2.2. Dark Period Credit Example: Annual installment of \$5,000.00 with a 61 day dark period:  $\$5,000 \div 365 \div 2 \times 61 = \$417.81$

4.7.3. A Dark Period Credit shall be applied against the next installment payment of the Base Use Fee following the end of the Dark Period. If this Agreement ends or if all or any part of a Dark Period Credit for any other reason cannot be used in conformance with these provisions, then it is extinguished.

4.7.4. All terms and provisions of this Agreement (e.g. Licensee's obligations to provide insurance (less workman's comp provisions) and indemnification and to maintain the Use Area in a clean and safe condition) shall remain in full force during any Dark Period.

4.7.5. City is not responsible to track whether a Dark Period has begun or ended and is not obligated to accept anything other than proper and timely notice of the beginning or end of a Dark Period. Without limitation, if Licensee does not give proper and timely notices of both the beginning and the end of a Dark Period, then no Dark Period shall be deemed to have occurred regardless of whether a Dark Period might otherwise have occurred.

4.8. Method of Payment. Unless and until City gives notice otherwise, Licensee shall pay City as follows:

4.8.1. Licensee may mail payments to: City of Scottsdale, Remittance Processor, 7447 East Indian School Road, Suite 215, Scottsdale, Arizona 85251. To ensure timely processing of physical payments, Licensee's payment must: a) include Licensee's billing account number from the invoice, b) include the City contract number as shown on this Agreement, and c) be made in the exact amount due; or

4.8.2. Licensee may pay online by visiting the website <https://eservices.scottsdaleaz.gov/olpp/Home/Pay>, selecting "General Billing", entering its email address, account number and pin number, and then selecting "Make a Payment."

4.8.3. Late Fees. Use Fee is deemed paid only when City actually receives good cash payment or a check that is honored when first presented by City for payment. Should City not receive any Use Fee on or before the date due, a late fee shall be added to the amount due in the amount of ten percent (10%) of the amount due. Any Use Fee that is not timely paid shall also accrue simple interest at the rate of one and one-half percent (1 ½ %) per month from the date the amount first came due until paid. Licensee expressly agrees that the foregoing represent fair and reasonable estimates by City and Licensee of City's costs (such as accounting, administrative, legal, and processing costs, etc.) caused by a delay in payment of the Use Fee. City may allocate payments received from Licensee among Licensee's obligations.

For any questions regarding payment processing, please contact City's accounts receivables department at [accountsreceivable@Scottsdaleaz.gov](mailto:accountsreceivable@Scottsdaleaz.gov) or (480) 312-2437.

#### ARTICLE 5. SECURITY DEPOSIT

- 5.1. Security Deposit. Upon execution of this Agreement, Licensee shall deposit with City, and maintain with City at all times during the Term, a cash security deposit in the amount of One Thousand and 0/100 dollars (\$1,000.00) to guarantee the faithful performance of this Agreement (the "**Security Deposit**"). City shall retain the Security Deposit until the expiration, cancellation, or termination of this Agreement. Any funds or property of Licensee held by or available to City or any issuer of a letter of credit, receiver, escrow agent, or other third party under or related to this Agreement may, in City's sole discretion, serve as all or a portion of the Security Deposit guaranteeing Licensee's faithful performance of this Agreement. Any portion of the Security Deposit to which Licensee may be entitled after expiration, termination, or cancellation of this Agreement, net of any setoff or other obligation of Licensee, shall be paid by City to Licensee without interest no later than sixty (60) days after such expiration, termination, or cancellation and completion of all of Licensee's obligations under this Agreement.

#### ARTICLE 6. CONTRACT ADMINISTRATORS

- 6.1. City Contract Administrator. The contract administrator for the City is the Real Estate Manager or her successor or designee (the "**City Contract Administrator**"). The City Contract Administrator shall oversee the administration of this Agreement.
- 6.2. Licensee Contract Administrator. The contract administrator for Licensee is Greg Donnally, [greg@otgscottsdale.com](mailto:greg@otgscottsdale.com), or his successor or designee (the "**Licensee Contract Administrator**"). Licensee Contract Administrator will serve as a point of contact for the City Contract Administrator in matters relating to this Agreement.
- 6.3. Change in Contract Administrators. The Parties shall notify each other should either desire to change its contract administrator or contact information within ten (10) days of such change.

## ARTICLE 7. IMPROVEMENTS BY CITY

- 7.1. Improvements by City. City has not promised, and is not obligated in any manner, to make any improvements or perform any other construction or other work at the Use Area or the Adjacent City Property.

## ARTICLE 8. LICENSEE IMPROVEMENTS

- 8.1. Licensee installation of private improvements. Licensee shall complete any construction of private improvements within the Use Area in accordance with all requirements of this Agreement. Improvements plans must be submitted to and approved by the Scottsdale Planning and Development Department.
- 8.1.1. Licensee improvements generally. The following provisions govern all improvements, repairs, installation, removal, demolition, and other construction work of any description by Licensee whether or not specifically described herein (collectively "**Licensee's Improvements**") upon or related to the Use Area:
- 8.1.1.1. All work shall be done strictly at Licensee's expense and paid for by Licensee. In no event, including without limitation termination of this Agreement for any reason, shall City be obligated to compensate Licensee in any manner for any of Licensee's Improvements or other work provided by Licensee during or related to this Agreement.
- 8.1.1.2. Construction. No construction can occur without a city issued Permit.
- 8.1.1.3. Construction Period: The construction period shall commence on the date the city issues the required permit(s) to licensee and shall end upon the date licensee receives final approval of the improvements by inspection services and/or a Certificate of Occupancy.
- 8.1.2. Encroachment Permit. If the Use Area are located in City's public street right-of-way, this Agreement serves as an encroachment permit under Chapter 47 of the Scottsdale Revised Code to the extent of granting permission from City for Licensee's private improvements to exist on the Use Area. Licensee shall not be required to obtain any further encroachment permit for the Licensee's Improvements for that narrow purpose. However, Licensee shall obtain additional encroachment permits at Licensee's expense as follows:
- 8.1.2.1. Licensee shall not alter or perform any work on the Use Area or Adjacent City Property without first obtaining a permit from City.
- 8.1.2.2. Licensee shall not in any way obstruct pedestrian or vehicular traffic in the right-of-way without first obtaining a permit from City.
- 8.1.2.3. Licensee shall apply for such encroachment permits and pay encroachment permit fees pursuant to normal encroachment permit processes.

- 8.1.3. Time for Completion. Licensee shall diligently and expeditiously pursue to completion the construction of all approved Licensee's Improvements.
- 8.2. Alterations and Modifications. City agrees that Licensee may, from time to time, desire to alter Licensee's Improvements, whether by addition or deletion (the "Alterations"), as may be necessary or desirable for the Use, provided however that:
- 8.2.1. If Licensee desires to make Alterations, Licensee shall first submit a written request to City with detailed plans. Licensee shall not make any Alterations at the Use Area without City's prior written consent, which shall not be unreasonably withheld.
- 8.2.2. City consent shall be conditioned upon Licensee's: (i) acquiring all applicable governmental permits; (ii) furnishing City with copies of both the permits and the plans and specifications prior to commencement of the work; and (iii) compliance with all conditions of said permits and other laws, covenants, or restrictions of record, regulations, and ordinances in a prompt and expeditious manner.
- 8.2.3. Licensee shall complete any Alterations at Licensee's sole expense.
- 8.2.4. Licensee shall complete any Alterations in a good and workmanlike manner and subject to the terms and conditions in this Agreement.
- 8.3. Improvements upon Termination. Upon expiration, termination, or cancellation of this Agreement, City, in its sole discretion, shall determine the following:
- 8.3.1. City may require Licensee to transfer title to Licensee's Improvements, equipment, and personal property of every description attached or affixed to the Use Area. In this event, title to Licensee's Improvements shall automatically vest in City without requirement of any deed, conveyance, or bill of sale. However, if City shall request any documents in confirmation thereof, Licensee shall promptly execute, acknowledge, and deliver the same to City. Licensee shall provide and assign to City all operating manuals, warranties, and similar materials pertaining to Licensee's Improvements, equipment, and personal property transferred to City. City shall have no obligation to reimburse Licensee for all or any portion of the cost or value of Licensee's Improvements.
- 8.3.2. In the alternative, City may require Licensee (at Licensee's sole expense) to remove Licensee's Improvements, equipment, and personal property of every description attached or affixed to the Use Area. In this event, Licensee shall repair the Use Area and City Property to match the adjacent finishes, and Licensee shall restore the Use Area and City property to its same condition prior to the Commencement Date, including without limitation reconstructing street and landscaping improvements. Unless City directs otherwise, wiring, pipes, and conduits shall be left in a good and safe condition with each end properly labeled and enclosed in proper junction boxes.

## ARTICLE 9. MAINTENANCE AND UTILITIES

- 9.1. Maintenance by Licensee. Licensee shall at all times repair, maintain, and replace the Use Area and all improvements and personalty thereon at Licensee's sole expense in a first-class, sound, clean, and attractive manner:
- 9.1.1. Licensee shall:
- 9.1.1.1. Monitor the cleanliness of the Use Area and take all necessary actions to maintain the cleanliness and safe use of both.
  - 9.1.1.2. Provide adequate and sanitary handling and disposal, away from the Use Area and Adjacent City Property, of all trash, garbage, and other refuse. Piling of boxes, cartons, barrels, debris, or other items outside the Use Area or in a manner visible from outside the Use Area or in a manner visible to areas open to the public is prohibited.
  - 9.1.1.3. Keep gutters and other areas within the Use Area and Adjacent City Property clear of obstructions, litter, and debris.
- 9.2. Maintenance by City. City has no maintenance responsibilities regarding the Use Area.
- 9.3. Utilities. Licensee shall contract for and pay all charges, fees, deposits, and other amounts for all utilities at the rates applicable thereto. Utility circuits must not be connected to City's systems.

## ARTICLE 10. BREACH BY LICENSEE

- 10.1. Breach by Licensee. Licensee shall comply with, perform, and do each thing required of Licensee herein, and Licensee's failure to do so shall be a breach by Licensee of this Agreement.
- 10.2. Events of Default. This entire Agreement is made upon the condition that each and every one of the following events shall be deemed an "Event of Default" and a material breach by Licensee of Licensee's material obligations under this Agreement:
- 10.2.1. If Licensee shall be in arrears in the payment of Use Fee and shall not cure such arrearage within ten (10) days after City has notified Licensee in writing of such arrearage.
  - 10.2.2. If Licensee shall fail to maintain any insurance required by this Agreement.
  - 10.2.3. If Licensee shall abandon the Use Area.
  - 10.2.4. If any environmental, health, or similar inspector issues any notice of investigation or violation of health, environmental, or similar regulations in connection with Licensee's use of the Use Area or determines during any two or more consecutive inspections that the same violation has been repeated or that the overall operation

falls materially below standards for first-rate, well-operated, similar facilities in Scottsdale, AZ.

- 10.2.5. If any assignment of any of Licensee's property shall be made for the benefit of creditors.
  - 10.2.6. If any representation or warranty made by Licensee in connection with this Agreement or the negotiations leading to this Agreement shall prove to have been false in any material respect when made.
  - 10.2.7. If the issuer of any guaranty, letter of credit, bond, or similar instrument shall fail for any reason to timely and fully honor any request by City for funds or other performance under the instrument.
  - 10.2.8. If Licensee shall fail to timely pay any taxes or other amounts herein required to be paid by Licensee to any third person.
  - 10.2.9. If Licensee shall fail to obtain or maintain any licenses, permits, or other governmental approvals from City or any other governmental body with respect to this Agreement, the Use Area, or the Permitted Use.
  - 10.2.10. If Licensee shall fail to or neglect to do or perform or observe any other provisions contained herein on its part to be kept or performed and such failure or neglect to do or perform or observe any of such other provisions shall continue for a period of thirty (30) days after City has notified Licensee in writing of Licensee's default hereunder.
  - 10.2.11. If Licensee shall engage in a pattern of repeated failure (or neglect) to do or perform or observe any provision contained herein.
- 10.3. City's Remedies. Upon the occurrence of any Event of Default or at any time thereafter, City may, at its option and from time to time, without further demand or notice, exercise any or all or any combination of the following remedies in any order and repetitively at City's option:
- 10.3.1. Terminate this Agreement.
  - 10.3.2. Enter into and upon the Use Area, or any part thereof, and expel Licensee and those claiming by, through, or under it, and remove their effects, if any, forcibly if necessary, without being deemed guilty of trespass and without prejudice to any other remedy.
  - 10.3.3. Enforce a lien (which is hereby granted to City) upon Licensee's property now or at any time hereafter at the Use Area securing all of Licensee's obligations hereunder.
  - 10.3.4. Cause a receiver to be appointed for the Use Area and for the continuing operation of Licensee's business thereon.

- 10.3.5. Pay or perform, for Licensee's account and at Licensee's expense, any or all payments or performances required hereunder to be paid or performed by Licensee.
- 10.3.6. Abate at Licensee's expense any violation of this Agreement.
- 10.3.7. Pursue at Licensee's expense any and all other remedies, legal or equitable, to which City may be entitled.
- 10.3.8. Refuse without any liability to Licensee therefore to perform any obligation imposed on City by this Agreement.
- 10.3.9. Be excused from further performance under this Agreement.
- 10.3.10. Notwithstanding anything in this Agreement to the contrary, unilaterally and without Licensee's or any other person's consent or approval, draw upon, withdraw, or otherwise realize upon or obtain the value of any letter of credit, escrowed funds, insurance policies, or other deposits, sureties, bonds, or other funds or security held by City or pledged or otherwise obligated to City by Licensee or by any third party (whether or not specifically mentioned herein) and use the proceeds for any remedy permitted by this Agreement.
- 10.3.11. Insist upon Licensee's full and faithful performance under this Agreement and upon Licensee's full and timely payment of all Use Fees during the Term.
- 10.3.12. Assert or exercise any other right or remedy permitted by law.
- 10.3.13. Notice of Breach. Licensee shall promptly give notice to City of any event or circumstance that is (or with the passing of time or the giving of notice or both will become) an Event of Default.
- 10.3.14. Non-waiver. Licensee acknowledges Licensee's unconditional obligation to comply with this Agreement. No failure by City to demand any performance required of Licensee under this Agreement, and no acceptance by City of any imperfect or partial performance under this Agreement, shall excuse such performance or impair in any way City's ability to insist, prospectively and retroactively, upon full compliance with this Agreement. No acceptance by City of Use Fee or other performances hereunder shall be deemed a compromise or settlement of any claim City may have for additional or further payments or performances. Any waiver by City of any breach of condition or covenant herein contained to be kept and performed by Licensee shall not be deemed or considered as a continuing waiver and shall not operate to bar or otherwise prevent City from declaring a default for any breach or succeeding breach either of the same condition or covenant or otherwise. No statement, bill or notice by City concerning payments or other performances due hereunder shall excuse Licensee from compliance with this Agreement nor estop City (or otherwise impair City's ability) to at any time correct such notice or insist prospectively and retroactively upon full compliance with this Agreement. No waiver of any description (including any waiver of this sentence or paragraph) shall be effective against City unless made in writing by a

duly authorized representative of City specifically identifying the particular provision being waived and specifically stating the scope of the waiver. Licensee expressly disclaims and shall not rely on any supposed waiver or other change or modification, whether by word or conduct or otherwise, not conforming to this paragraph.

10.3.15. Reimbursement of City's Expenses. Licensee shall pay to City upon demand any and all amounts expended or incurred by City in performing Licensee's obligations.

10.3.16. Inspection. City shall have access to the Use Area at all times upon reasonable prior notice (and at all times and without notice if there is an emergency) for the purpose of examining, inspecting, evaluating, planning, repairing, designing, maintaining, or showing the Use Area or exercising City's other rights hereunder. Licensee shall promptly undertake appropriate action to rectify any deficiency (identified by City during such inspections or otherwise) in Licensee's compliance with this Agreement. This paragraph does not limit City's other rights of access to the Use Area elsewhere in this Agreement or otherwise.

10.3.17. Default by City. Notwithstanding anything in this Agreement to the contrary, if City at any time is required to pay to Licensee any amount or render any performance, such amount or performance is not due until thirty (30) days after notice by Licensee to City that the amount has become payable or that the performance is due. If a cure cannot be affected during that period, City shall not be in default so long as City commences cure during the period and diligently prosecutes the cure to completion provided such cure must be completed within sixty (60) days after it is due.

## ARTICLE 11. TERMINATION

11.1. Delivery of Possession. Upon the expiration, cancellation, or termination of this Agreement, Licensee shall, without demand, peaceably and quietly quit and deliver up the Use Area to City thoroughly cleaned, in good repair, maintained, and repaired and in as good order and condition, reasonable use and wear excepted, as the same now are or in such better condition as the Use Area may hereafter be placed by Licensee or City.

11.2. Surviving Obligations. Licensee's obligations existing or arising prior to or simultaneous with, or attributable to, the expiration, cancellation, or termination of this Agreement or events leading to or occurring before such expiration, cancellation, or termination shall survive and not terminate.

11.3. Abandoned Property. Any personal property and improvements of Licensee or persons claiming through Licensee that may be located at the Use Area at the expiration, cancellation, or termination of this Agreement shall be deemed to be abandoned and shall automatically at City's election become the property of City to dispose of at City's discretion without accounting to Licensee or to others.

## ARTICLE 12. INDEMNITY AND INSURANCE

- 12.1. Indemnification. To the fullest extent permitted by law, Licensee, its officers, employees, contractors, agents and assigns, shall defend, indemnify, and hold harmless City, its agents, representatives, officers, directors, officials and employees (the “**Additional Insureds**”) for, from, and against any and all claims or harm related to the performance of Licensee’s obligations under this Agreement (the “**Indemnity**”). Without limitation, the Indemnity shall include and apply to any and all allegations, demands, judgments, assessments, taxes, impositions, expenses, proceedings, liabilities, obligations, suits, actions, claims (including without limitation claims of personal injury, bodily injury, sickness, disease, death, property damage, destruction, loss of use, or other impairment), damages, losses, expenses, penalties, fines, or other matters (together with all attorneys’ fees, court costs, and the cost of appellate proceedings) that may arise in any manner out of this Agreement including those resulting from any acts, errors, mistakes, omissions, or negligent, reckless or intentional actions caused in whole or in part by the Licensee relating to or arising from the Use, including any injury, damages, or cause of action claimed or caused by any of Licensee’s employees, contractors, subcontractors, agents, or other persons upon or using the Use Area, City Property, or surrounding areas, including without limitation claims, liability, harm, or damages caused in part by City or Additional Insureds or anyone for whose mistakes, errors, omissions, or negligence Licensee or City may be liable.
- 12.2. Insurance Policies and Coverages. Immediately following the Effective Date and at all times prior to the expiration, cancellation, or termination of this Agreement, Licensee and if applicable, their sublicensee or tenant, shall obtain and cause to be in force and effect certain insurance policies and coverages (collectively, the “**Policy(ies)**”) subject to certain requirements (i) unless the City specifically waives or reduces the coverage(s) in writing; as follows:
- 12.2.1. Commercial General Liability. Owner shall procure and maintain in force and effect commercial general liability insurance with a limit of five million and 0/100 dollars (\$5,000,000.00) for each occurrence, a limit of five million and 0/100 dollars (\$5,000,000.00) for products and completed operations annual aggregate, and a limit of five million and 0/100 dollars (\$5,000,000.00) general aggregate limit per policy year (the “**CGL Policy**”). The CGL Policy shall cover liability arising from premises, operations, independent contractors, products, completed operations, personal injury, bodily injury, advertising injury, and liability assumed under an “insured contract” including this Agreement. The CGL Policy shall cover Licensee’s liability under the indemnity provisions of this Agreement. The CGL Policy shall contain a “separation of insureds” clause.
- 12.2.2. Liquor Liability. Liquor liability insurance in an amount not less than One Million Dollars (\$1,000,000.00) for each claim and Two Million Dollars (\$2,000,000.00) for all claims in the aggregate. This coverage is required at all times when alcohol is being consumed, sold, or served at the Use Area, or when Licensee holds any type of liquor license for the Use Area, or when any liquor license otherwise exists with respect to the Use Area.

- 12.2.3. Automobile Liability. Licensee shall procure and maintain in force and effect business automobile liability insurance with a combined single limit of one million and 0/100 dollars (\$1,000,000.00) for each occurrence covering any and all owned, hired, and non-owned vehicles assigned to or used in any way in connection with Licensee's use of the City Property (the "**Automobile Policy**"). Without limitation, the Automobile Policy shall cover hazards of motor vehicle use for loading and unloading. If any excess insurance is utilized to fulfill the requirements of the Automobile Policy, the excess insurance shall be "follow form" equal or broader in coverage scope than underlying insurance.
- 12.2.4. Workers' Compensation. Licensee shall procure and maintain in force and effect such workers' compensation and similar insurance as is required by law and employer's liability insurance with a minimum limit of one hundred thousand and 0/100 dollars (\$100,000.00) for each accident, one hundred thousand and 0/100 dollars (\$100,000.00) disease for each employee, and five hundred thousand and 0/100 dollars (\$500,000.00) policy limit for disease. If Licensee has no employees, then Licensee shall provide a "sole proprietor waiver" signed by Licensee in form and content acceptable to City. All contractors and subcontractors must also provide this same insurance policy and coverages.
- 12.2.5. Professional Liability. Licensee shall procure and maintain in force and effect professional liability insurance covering errors and omissions arising out of the work or services performed by Licensee or anyone employed by Licensee with a liability insurance limit of two million and 00/100 dollars (\$2,000,000.00) each claim and aggregate.
- 12.2.6. Other Insurance. Licensee shall procure and maintain in force and effect any other insurance City may reasonably require from time to time to protect City, the Additional Insureds, the City Property, surrounding property, Licensee, or the activities carried on or about the City Property.
- 12.2.7. Changes to Policies. City may increase the amount or type of any insurance to account for inflation, changes in risk, or any other factor that City reasonably determines to affect the prudent amount of insurance to be provided.
- 12.2.8. Additional Requirements of Policies. The Policies shall include the following:
- 12.2.8.1. Additional Insureds. City of Scottsdale, its agents, representatives, officers, directors, officials and employees shall be named an Additional Insureds under the CGL Policy, the Automobile Policy, and any other insurance City may require.
- 12.2.8.2. Insurance Primary. The Policies shall be primary insurance with respect to this Agreement.
- 12.2.8.3. Waiver of Subrogation. The Policies, except Professional Liability, if applicable, shall waive rights of recovery (subrogation) against City, its agents, representatives, officers, directors, officials and employees for

any claims arising out of work or services performed by Licensee under this Agreement.

- 12.2.8.4. Coverage Term. The Policies shall be maintained in full force and effect until all work and services required by this Agreement are satisfactorily performed, completed, and formally accepted by City, except if any of the Policies are written on a "claims made" basis, coverage shall extend, either by keeping coverage in force or purchasing an extended reporting option, for three (3) years past the expiration, cancellation, or termination of this Agreement, as evidenced by the submission of annual COIs (as defined below) citing applicable coverage is in force and contains provisions as required herein for the three-year period.
- 12.2.9. Acceptable Insurers. Licensee shall purchase and maintain the Policies, at its own expense, with insurance companies duly licensed by the State of Arizona (admitted insurer) with an AM Best, Inc. rating of B ++ 6 or above or an equivalent qualified unlicensed insurer by the State of Arizona (non-admitted insurer) with policies and forms satisfactory to City unless otherwise agreed upon in writing by the parties. Failure to maintain insurance as specified may result in termination of this Agreement in City's sole discretion.
- 12.2.10. Policy Deductibles and Self-Insured Retentions. The Policies may contain deductibles or self-insured retention amounts. Such deductibles or self-insured retention shall not be applicable with respect to the policy limits provided to City. Licensee shall be solely responsible for any deductible or self-insured retention amount. City, in its discretion, may require Licensee to secure payment of the deductible or self-insured retention by a surety bond or irrevocable and unconditional Letter of Credit.
- 12.2.11. Evidence of Insurance. No later than thirty (30) days after the Effective Date and each year on the annual anniversary of the Commencement Date, Licensee shall furnish City with Certificate(s) of Insurance (the "COI(s)") or formal endorsements issued by Licensee's insurer(s) as evidence that the Policies are placed with acceptable insurers and provide the required coverage, conditions, and limits of coverage and that such coverage and provisions are in full force and effect. If a COI is submitted as verification of coverage, City shall reasonably rely upon the COI as evidence of coverage, but such acceptance and reliance shall not waive or alter in any way the insurance requirements or obligations of this Agreement. Each COI shall identify the contract number, location, the date of this Agreement and the Parties' names and shall be sent to the designated City Contract Administrator and to realestate@scottsdaleaz.gov. COIs submitted without referencing the appropriate contract number, location, and reference to this Agreement may be rejected, returned, and discarded. If any of the Policies expire or are cancelled prior to the expiration, cancellation, or termination of this Agreement, Licensee shall forward new certificates within ten (10) days after the expiration or cancellation date.

- 12.2.12. City's Election to Provide Insurance. City is not required to carry any insurance covering or affecting the City Property, Use Area, or the Use. If Licensee fails to acquire all or any part of the insurance required by this Agreement, City may elect to provide such insurance (with or without any other real property City may own or control), and Licensee shall pay to City the costs of such insurance as reasonably determined by City. Licensee shall provide all required insurance not otherwise provided by City. Any insurance or self-insurance maintained by City shall not contribute to Licensee's insurance.
- 12.2.13. Insurance Proceeds. All property insurance proceeds (whether actually paid before or after the Term) shall be paid directly to City for City's use in compensating City for the loss; for protecting City, the City Property, and the public from every other loss or exposure suffered by City; and for rebuilding the City Property and satisfying and securing Licensee's obligations hereunder. Any remaining proceeds shall be allocated among City and Licensee as their interests may appear.
- 12.2.14. Insurance to be Provided by Others. If Licensee contracts or otherwise delegates any work or use of the City Property or Use Area under this Agreement, including the use of any contractors or subcontractors and other persons occupying, working on or about, or using the City Property or Use Area pursuant to this Agreement, Licensee shall cause said delegate to execute and provide to City a writing executed by the delegate evidencing the delegate agrees to provide at least the same indemnification and insurance provisions set forth herein. Licensee is responsible for obtaining COIs verifying that the insurance requirements have been obtained by the delegate.
- 12.2.15. No Representation of Coverage Adequacy. By requiring insurance herein, the City does not represent that coverage and limits will be adequate to protect Licensee, City, or others. City reserves the right to review any and all of the insurance policies and endorsements cited in this Agreement but has no obligation to do so. Failure to demand evidence of full compliance with the insurance requirements stated in this Agreement or failure to identify any insurance deficiency will not relieve the Licensee from, nor be construed or considered a waiver of, its obligation to maintain the required insurance at all times during the performance of this Agreement.
- 12.3. Indemnities and Insurance Cumulative. Licensee's obligations to indemnify do not diminish in any way Licensee's obligations to insure; and Licensee's obligations to insure do not diminish in any way Licensee's obligations to indemnify. Licensee's obligations to indemnify and provide insurance are in addition to, and do not limit, any and all other liabilities or obligations of Licensee under or connected with this Agreement. The amount and type of insurance policies and coverages required by this Agreement will in no way be construed as limiting the scope of the indemnities or other requirements of this Agreement.

### ARTICLE 13. CONDEMNATION

- 13.1. Condemnation. If any part of the Use Area shall be acquired or condemned by eminent domain for any public or quasi-public use or purpose, and if such taking or condemnation shall render the Use Area unsuitable for the Permitted Use in City's opinion, then the Term shall cease and terminate as of the date of the condemnor taking possession in such proceeding and Licensee shall have no claim to any condemnation proceeds. If a partial taking or condemnation is not extensive enough to render the Use Area unsuitable for the Permitted Use, Licensee shall restore the Use Area to a condition comparable to its condition at the time of such condemnation less the portion lost in the taking and this Agreement shall continue in full force and effect, with condemnation proceeds being used to restore the Use Area and any excess being retained by City. Licensee acknowledges that City from time to time may have or acquire, and may use, the power to condemn the Use Area or any interests therein or rights thereto. Licensee on behalf of all persons claiming under this Agreement unconditionally and irrevocably waives any right to contest City's power to take or the proper exercise of such power. This paragraph does not limit City's power to terminate this Agreement as provided elsewhere in this Agreement.

### ARTICLE 14. DAMAGE TO OR DESTRUCTION OF USE AREA

- 14.1. Damage to or Destruction of Use Area. If the Use Area is damaged by fire, explosion, the elements, the public enemy, or other casualty through no fault of Licensee and the cost of repair exceeds Three Thousand Dollars (\$3,000.00), Licensee may elect within thirty (30) days after the damage to give notice to City terminating this Agreement. Otherwise, Licensee shall restore the damage to the Use Area at Licensee's sole cost and expense.

### ARTICLE 15. COMPLIANCE WITH LAW

- 15.1. Compliance with Law. Licensee shall perform its obligations under this Agreement in accordance with all federal, state, county and local laws, ordinances, regulations or other rules or policies as are now in effect or as may hereafter be adopted or amended.
- 15.2. Applicability of Municipal Law. Without limitation, Licensee shall comply with municipal laws as follows:
- 15.2.1. Licensee acknowledges that this Agreement does not constitute, and City has not promised or offered, any type of waiver of or agreement to waive (or show any type of forbearance, priority, or favoritism to Licensee with regard to) any law, ordinance, power, regulation, tax, assessment, or other legal requirement now or hereafter imposed by the City of Scottsdale or any other governmental body upon or affecting Licensee, Use Area, Adjacent City Property, or Licensee's use of Use Area or Adjacent City Property.
- 15.2.2. In the case of an ordinance or other law of the City authorizing a credit, reduction in tax or amount charged or assessed, or any other benefit as a result of performances rendered under this Agreement, Licensee expressly waives, relinquishes, and repudiates all such benefits with respect to performances rendered under this Agreement.

- 15.2.3. This Agreement does not impair City's power to enact, apply, or enforce any laws or regulations or exercise any governmental powers affecting in any way Licensee, the Use Area, the Adjacent City Property, or the Licensee's Parcel.
- 15.2.4. City's rights and remedies hereunder for Licensee's failure to comply with all applicable laws supplement and are in addition to and do not replace otherwise existing powers of the City of Scottsdale or any other governmental body.
- 15.3. Food Laws. Licensee shall at all times comply with all applicable federal, state, City, county, and other lawfully promulgated health, food, and drug rules, regulations, standards, laws, and ordinances. Licensee shall at its own expense obtain and maintain all necessary licenses and permits permitting the sale of food and beverages at the Use Area.
- 15.4. Permits. Licensee shall obtain at its own expense all building or other permits in connection with any construction performed by Licensee and shall comply with all zoning, building safety, fire, and similar laws and procedures of every description.
- 15.5. Governmental Relations. Licensee shall conduct its activities at the Use Area in coordination with City as necessary to maintain good relations with all governmental entities having jurisdiction over the Use Area and shall immediately give City notice of any actual or threatened dispute, violation, or other disagreement relating to the Use Area.
- 15.6. Public Safety. If City determines that any Licensee equipment, improvements, or activities present a hazard to the public or to City, to City's equipment or facilities, or to City's ability to safely and conveniently operate the Use Area, the adjoining Right-of-way, or other nearby public lands, or perform City's utility, public safety, and other public, health, safety, and welfare functions, Licensee shall immediately remedy the hazard, comply with City's requests to secure the Use Area, the adjoining Right-of-way, or other nearby public lands, and otherwise cooperate with City at no expense to City in performing any and all of such functions.
- 15.7. Security Requirements. Licensee shall participate in any public safety program promulgated from time to time by the City of Scottsdale Police Department or other law enforcement agency selected by City. Licensee shall reasonably cooperate with City and the City of Scottsdale Police regarding concerns and countermeasures affecting security and related risks of business and other operations and activities at and near the Use Area.
- 15.8. Taxes, Liens and Assessments. In addition to all other Use Fees herein provided, Licensee shall pay, when due and as the same become due and payable, all taxes and general and special fees, charges, and assessments of every description which during the Term may be levied upon or assessed against the Use Area, the operations conducted therein, any Use Fees paid or other performances under this Agreement by either party, and all possessory interest in the Use Area and improvements and other property thereon, whether belonging to the City or Licensee; and Licensee agrees to indemnify, defend, and hold harmless City and the Use Area and such property and all interest therein and improvements thereon from any and all such taxes and assessments, including any interest, penalties, and other expenses that may be imposed, and from any lien therefor or sale or other proceedings to

enforce payment thereof. Licensee may contest, but not the right to refuse to timely pay, any taxes and assessments. City may from time to time require that all of the foregoing payments be made by Licensee through City. Licensee shall pay all sales, transaction privilege, and similar taxes.

#### ARTICLE 16. ASSIGNMENTS

- 16.1. Assignments Generally. Licensee shall not voluntarily or involuntarily assign, convey, or transfer the right to use the Use Area or any interest therein or any rights under this Agreement, in whole or in part, or allow others to use, occupy, manage, control, or operate the Use Area, in whole or in part, without the prior written consent of City. If Licensee will have a tenant, upon notification of the identity of the tenant, City in its sole discretion may consent to Licensee's tenant's use of the Use Area solely for outdoor dining as set forth in this Agreement. The City may revoke its consent in its sole discretion in the event of a breach of any term of the Agreement by Licensee or its tenant.
- 16.1.1. Assignment Fee. If Licensee desires to assign this Agreement, Licensee shall pay to City the sum of One Thousand Dollars (\$1,000.00) as a fee for legal and administrative expenses before making any request for consent to an assignment.
- 16.1.2. Form of Assignment. Any assignment shall be by agreement in form and content acceptable to the City. Without limitation, any assignment shall specify and require that each assignee acquiring any interest under this Agreement shall assume, be bound by, and be obligated to perform the terms and conditions of this Agreement and that, if City terminates this Agreement because of default by Licensee, City at City's sole option may succeed to the position of Licensee as to any assignee of Licensee without liability for any prior breaches or performances by persons other than City.
- 16.1.3. Assignment Approvals. City has the absolute right for any reason or for no reason in its sole discretion to give or withhold consent to any assignment. City may elect to amend this Agreement as a precondition to consenting to any assignment.
- 16.2. Prohibited Assignments. A prohibited assignment shall be void and vest no rights in the assignee. Notwithstanding the foregoing, City may, in its sole discretion and in addition to all other remedies available to City under this Agreement or otherwise, collect the Use Fee from an assignee and apply the net amount collected to the Use Fee required to be paid hereunder or void the assignment, all without prejudicing any other right or remedy of City under this Agreement. No cure or grace periods shall apply to prohibited assignments or to enforcement of this Agreement against an assignee who did not receive City's prior written consent.
- 16.3. Liens Prohibited. Licensee shall not voluntarily or involuntarily pledge, lien, mortgage, grant a security interest or deed of trust, or allow any judgment, claim, demand, or lien (collectively hereinafter, "Liens") to accrue against the Use Area.
- 16.4. Lien Payment. Licensee shall pay all Liens as the same become due, and in any event before any judicial or non-judicial action or proceeding is commenced to enforce a Lien.

Licensee shall pay, indemnify, defend, and hold City and the Use Area free and harmless for, from, and against any and all Liens, together with all liability, costs, and expenses in connection therewith, including attorney's fees. City may at any time post and maintain on the Use Area such notices, pay such amounts, file or record such notices, or take such other actions as City may deem necessary to protect City and its property interests against all Liens.

- 16.5. Assignment of Licensee's Parcel. No grant or other transfer of fee title to the Licensee's Parcel shall occur without a corresponding assignment of Licensee's rights under this Agreement to the same grantee. In addition to all of City's other remedies, City may unilaterally terminate this Agreement if this Agreement is not assigned to and assumed by any grantee of the Licensee's Parcel, even if the assignment is prevented by City's failure to consent to such assignment.

#### ARTICLE 17. MISCELLANEOUS

- 17.1. Amendments and Assignments. This Agreement may only be amended or assigned by a formal writing executed by the licensee and contract administrator.
- 17.2. Limited Severability. If any term, condition, covenant, stipulation, agreement, or provision herein contained (a "Provision") is held to be invalid or unenforceable for any reason, the invalidity of such Provision shall in no way affect any other Provision herein contained. Further, this Agreement shall be deemed automatically reformed to secure to City the legal, equitable, practical, and other benefits of the Provisions of this Agreement as written to the very maximum extent permitted by law.
- 17.3. Conflicts of Interest. No member, official, or employee of City shall have any direct or indirect interest in, nor participate in any decision relating to, this Agreement that is prohibited by law.
- 17.4. No Partnership. This Agreement and the transactions and performances contemplated hereby shall not create any partnership, joint venture, or similar relationship between the parties.
- 17.5. Nonliability of City Officials and Employees. No member, official, representative, or employee of City shall be personally liable or otherwise responsible to any party or to any successor in interest to any party for any default or breach by City or for any performance or amount that may become due to any party or successor or with respect to any obligation of City or otherwise under the terms of this Agreement or related to this Agreement.
- 17.6. Time of Essence. Time is of the essence of each and every provision of this Agreement.
- 17.7. Integration. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes any prior agreement, understanding, negotiation, or representation regarding the subject of this Agreement.
- 17.8. Construction. Whenever the context of this Agreement requires, the singular shall include the plural, and the masculine shall include the feminine. This Agreement shall be construed

according to its plain meaning and neither for nor against any party hereto. Licensee acknowledges that the Use Fee payable hereunder was negotiated in light of the plain meaning of this Agreement, and this Agreement shall therefore be interpreted according to its plain meaning and without regard to rules of interpretation, if any, that might otherwise favor Licensee.

- 17.9. Paragraph Headings. The paragraph headings contained herein are for convenience in reference only and not intended to define or limit the scope of any provision of this Agreement.
- 17.10. No Third-Party Beneficiaries. Except for limited provisions, if any, expressly stated to be "for the benefit of" a third party, no person or entity shall be a third-party beneficiary to this Agreement or shall have any right or cause of action hereunder. City shall have no liability to third parties for any approval of plans, Licensee's construction of improvements, Licensee's negligence, Licensee's failure to comply with the provisions of this Agreement (including any absence or inadequacy of insurance required to be carried by Licensee), or otherwise because of the existence of this Agreement.
- 17.11. Attorneys' Fees. If any action, suit, or proceeding is brought by either party to enforce compliance with this Agreement or for failure to observe any of the terms of this Agreement or to vindicate or exercise any rights or remedies hereunder, the party which does not prevail shall pay all costs of such action or suit and all expenses of such action or suit together with such sum as the court may adjudge reasonable as attorneys' fees to be allowed in said suit, action, or proceeding.
- 17.12. Choice of Law. This Agreement shall be governed by the laws of the State of Arizona. Exclusive proper venue for any action regarding this Agreement shall be Maricopa County.
- 17.13. Approvals and Inspections. All approvals, reviews and inspections by City under this Agreement or otherwise are for City's sole benefit and not for Licensee's benefit.
- 17.14. Statutory Cancellation Right. In addition to its other rights hereunder, City shall have the rights specified in A.R.S. § 38-511.
- 17.15. Notices. Notices hereunder shall be given in writing personally served upon the other party or mailed by registered or certified mail, return receipt requested, postage prepaid addressed to:

If to City:       Real Estate Asset Manager  
                          City of Scottsdale  
                          7447 East Indian School Road, Suite 205  
                          Scottsdale, AZ 85251

Copies to:        City Attorney  
                          City of Scottsdale  
                          3939 North Drinkwater Boulevard  
                          Scottsdale, AZ 85251

If to Licensee: 5<sup>th</sup> Avenue Scottsdale LLC  
Attn: Greg Donnally  
3417 N 43<sup>rd</sup> St.  
Phoenix, AZ 85018.  
(602) 418-1872

or to such other street address within Maricopa County, Arizona as may be designated by the respective parties in writing from time to time. Notices to Licensee may instead be hand delivered to Licensee's Parcel. Service of notice by mail shall be deemed to be complete forty-eight (48) hours after the notice is deposited in the United States mail.

Should City create invoices, they may be sent to Licensee via email to:  
[aandrews@chopshopco.com](mailto:aandrews@chopshopco.com) & [calarcon@chopshopco.com](mailto:calarcon@chopshopco.com)

With a copy to:  
[Greg@otgscottsdale.com](mailto:Greg@otgscottsdale.com)

- 17.16. Funding. Notwithstanding any provision of this Agreement, if funds necessary to fulfill City's obligations under this Agreement are not appropriated by the Scottsdale City Council, City may terminate this Agreement by ten (10) days' notice to Licensee. Termination in accordance with this provision shall not constitute a breach of this Agreement by City. No person will be entitled to any compensation, damages, or other remedy from City if this Agreement is terminated pursuant to the terms of this subsection.
- 17.17. Further Assurances. Licensee agrees to do such further acts and things and to execute and deliver such additional agreements and instruments as City may reasonably require to consummate, evidence, confirm, and carry out the agreement contained herein.
- 17.18. Survival of Liability. All obligations of Licensee hereunder and all warranties and indemnities of Licensee hereunder shall survive termination of this Agreement for any reason.

*[signatures on following pages]*

IN WITNESS WHEREOF, the Parties have executed this Agreement by signing their signatures as of the day and date first written above.

**LICENSEE:**  
5th Avenue Scottsdale, LLC  
an Arizona limited liability company

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

Name: Greg Donnally

Its: Sole Member

**ACKNOWLEDGMENT**

State of Arizona    )  
                          )ss  
County of Maricopa)

The foregoing instrument was acknowledged before me this \_\_\_\_\_ day of \_\_\_\_\_ 20\_\_\_\_  
by Greg Donnally, sole member of 5<sup>th</sup> Avenue Scottsdale, LLC.

My Commission Expires: \_\_\_\_\_  
Notary Public

**CITY:**  
CITY OF SCOTTSDALE,  
an Arizona municipal corporation

\_\_\_\_\_  
Lisa Borowsky, Mayor

ATTEST:

\_\_\_\_\_  
Ben Lane, City Clerk

APPROVED AS TO FORM:  
OFFICE OF THE CITY ATTORNEY



\_\_\_\_\_  
Luis E. Santaella, City Attorney  
By: Joe Padilla, Deputy City Attorney

**Exhibit A**

**Use Area**

**SCOTTSDALE ROAD  
USE AREA**

A portion of Scottsdale Road Right-of-Way, lying within the southeast quarter of Section 22, Township 2 North, Range 4 East, of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, more particularly described as follows:

Commencing at the southeast corner of Section 22, a City of Scottsdale Brass Cap in handhole, from which the east quarter corner of said Section 22, a Maricopa County Brass Cap in handhole, bears North 00°00'00" West, 2656.21 feet;

Thence along the east line of the southeast quarter of said Section 22, North 00°00'00" West, 1328.32 feet;

Thence leaving said east line, South 89°00'35" West, 47.01 feet, to the westerly right-of-way line of Scottsdale Road;

Thence along said westerly right-of-way line, South 00°00'00" East, 6.81 feet, to the Point of Beginning;

Thence leaving said westerly right-of-way line, North 90°00'00" East, 8.50 feet;

Thence South 00°00'00" West, 22.18 feet;

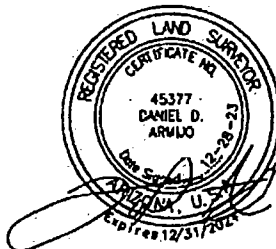
Thence South 39°12'37" West, 2.99 feet;

Thence North 90°00'00" West, 6.61 feet, to the westerly right-of-way line of Scottsdale Road;

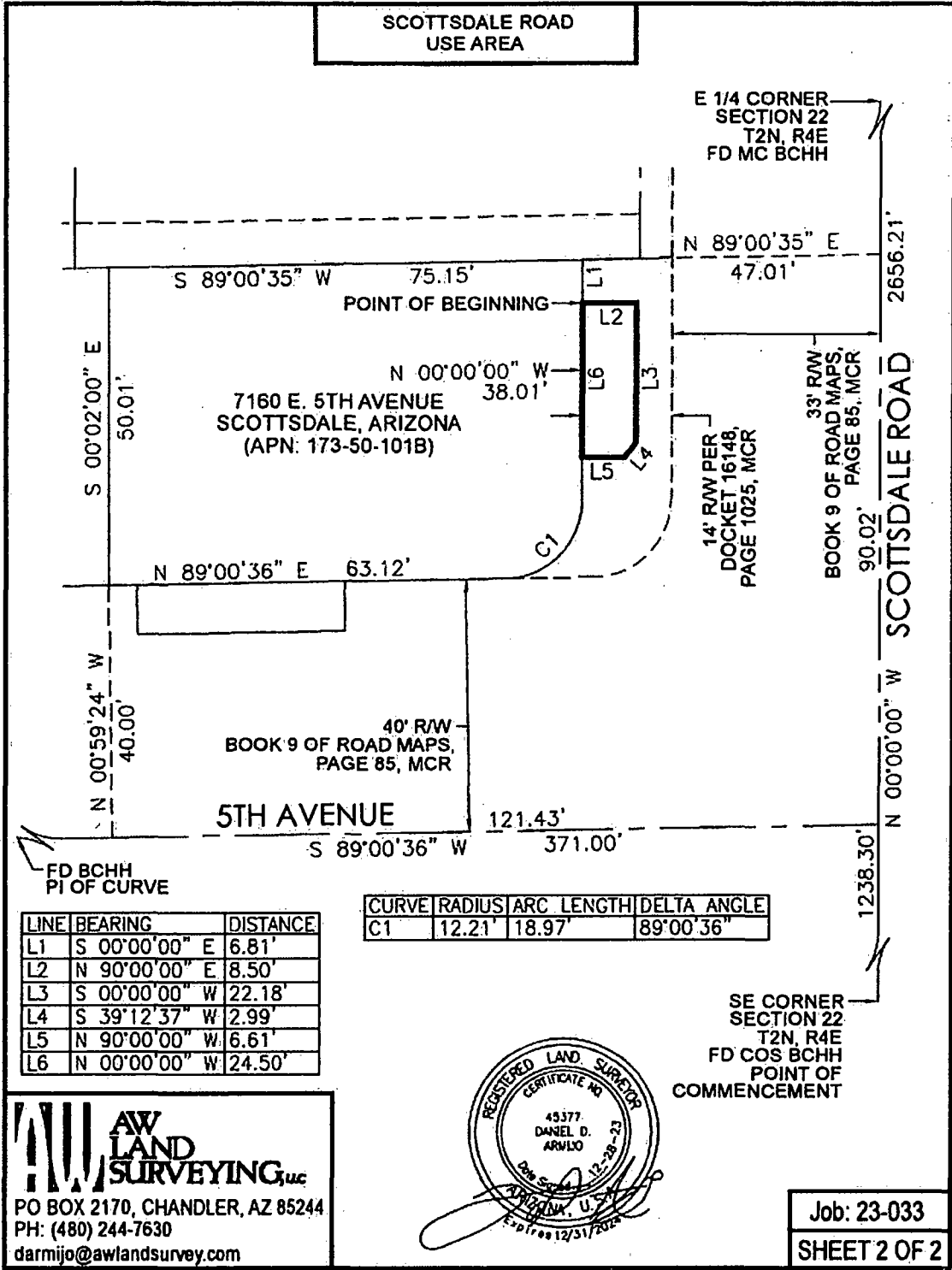
Thence along said westerly right-of-way line, North 00°00'00" West, 24.50 feet, to the Point of Beginning.

Containing 206 Square Feet or 0.005 Acres more or less.

**AW  
LAND  
SURVEYING, LLC**  
PO BOX 2170, CHANDLER, AZ 85244  
PH: (480) 244-7630  
darmi@awlandsurvey.com



Job: 23-033  
SHEET 1 OF 2



5TH AVENUE  
USE AREA

A portion of 5th Avenue Right-of-Way, lying within the southeast quarter of Section 22, Township 2 North, Range 4 East, of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, more particularly described as follows:

Commencing at the southeast corner of Section 22, a City of Scottsdale Brass Cap in handhole, from which the east quarter corner of said Section 22, a Maricopa County Brass Cap in handhole, bears North 00°00'00" West, 2656.21 feet;

Thence along the east line of the southeast quarter of said Section 22, North 00°00'00" West, 1238.30 feet, to the centerline of 5th Avenue;

Thence leaving said east line, along said centerline, South 89°00'36" West, 121.43 feet;

Thence leaving said centerline, North 00°59'24" West, 40.00 feet, to the northerly right-of-way line of 5th Avenue ;

Thence along said northerly right-of-way line, North 89°00'36" East, 4.50 feet, to the Point of Beginning;

Thence continuing, North 89°00'36" East, 33.00 feet;

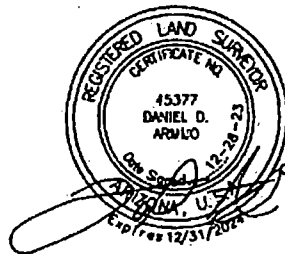
Thence leaving said northerly right-of-way line, South 00°59'24" East, 7.83 feet;

Thence South 89°00'36" West, 33.00 feet;

Thence North 00°59'24" West, 7.83 feet, to the Point of Beginning.

Containing 258 Square Feet or 0.006 Acres more or less.

**AW  
LAND  
SURVEYING, LLC**  
PO BOX 2170, CHANDLER, AZ 85244  
PH: (480) 244-7630  
darmijo@awlandsurvey.com



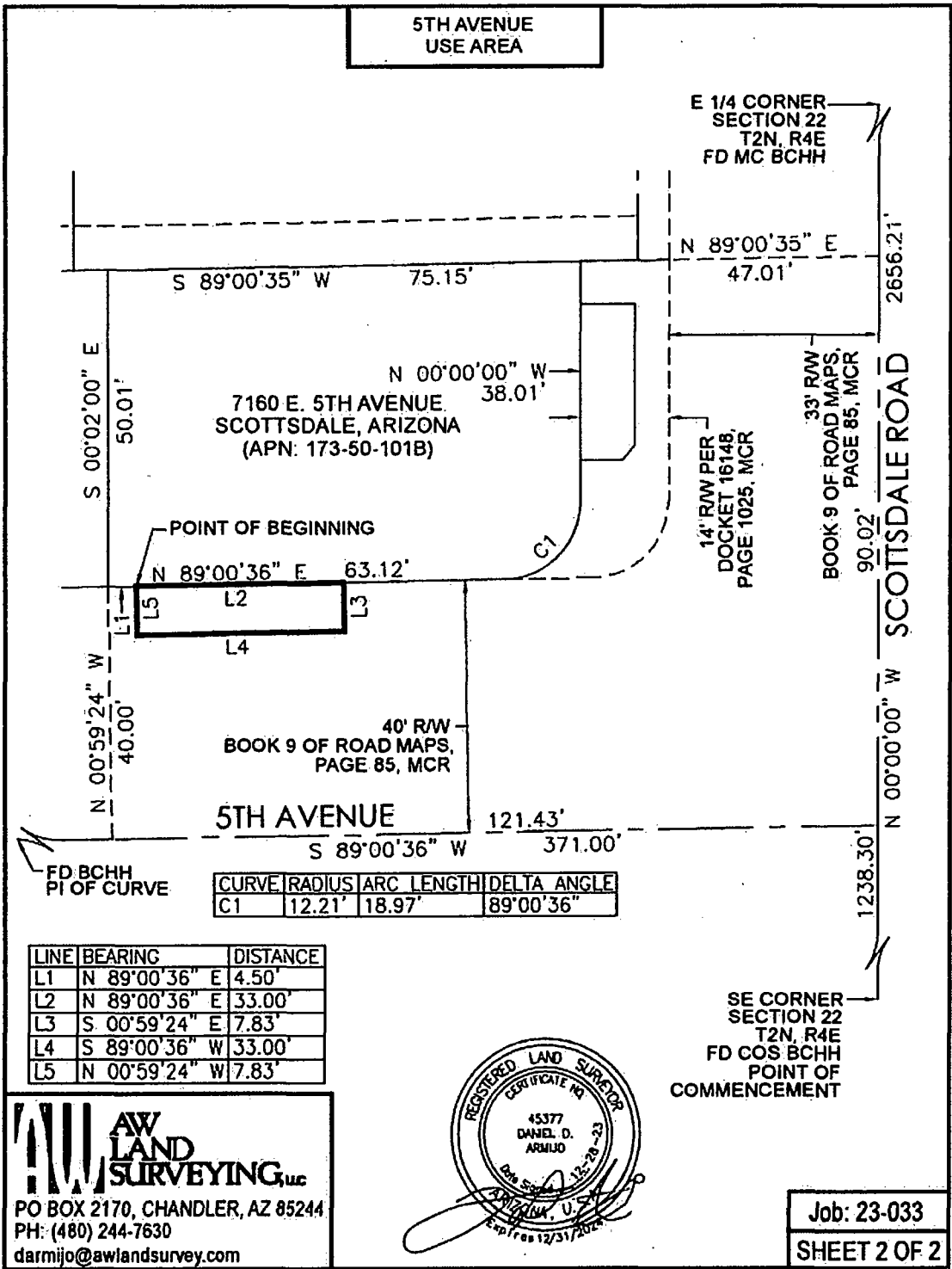
Job: 23-033

SHEET 1 OF 2

Exhibit A

Contract No. 2026-069-COS

Page 3 of 4



FD BCHH  
PI OF CURVE

CURVE	RADIUS	ARC LENGTH	DELTA ANGLE
C1	12.21'	18.97'	89°00'36"

LINE	BEARING	DISTANCE
L1	N 89°00'36" E	4.50'
L2	N 89°00'36" E	33.00'
L3	S 00°59'24" E	7.83'
L4	S 89°00'36" W	33.00'
L5	N 00°59'24" W	7.83'

**AW LAND SURVEYING, LLC**  
 PO BOX 2170, CHANDLER, AZ 85244  
 PH: (480) 244-7630  
 darmijo@awlandsurvey.com



SE CORNER  
SECTION 22  
T2N, R4E  
FD COS BCHH  
POINT OF  
COMMENCEMENT

Job: 23-033  
SHEET 2 OF 2

**Exhibit B**

**Licensee Parcel**

7160 E. 5TH AVENUE  
SCOTTSDALE, ARIZONA

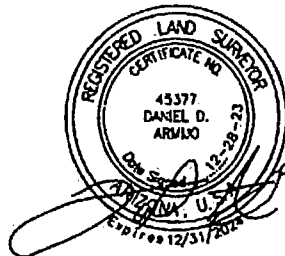
A portion of that certain parcel of land described in Document No. 2014-0231767, Maricopa County Records (MCR), lying within the southeast quarter of Section 22, Township 2 North, Range 4 East, of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, more particularly described as follows:

Commencing at the southeast corner of Section 22, a City of Scottsdale Brass Cap in handhole, from which the east quarter corner of said Section 22, a Maricopa County Brass Cap in handhole, bears North 00°00'00" West, 2656.21 feet;  
Thence along the east line of the southeast quarter of said Section 22, North 00°00'00" West, 1328.32 feet;  
Thence leaving said east line, South 89°00'35" West, 47.01 feet, to the westerly right-of-way line of Scottsdale Road and to the Point of Beginning;

Thence along said westerly right-of-way line, South 00°00'00" East, 38.01 feet, to the beginning of a curve, concave northwesterly, having a radius of 12.21 feet;  
Thence leaving said westerly right-of-way line, southwestly along said curve, an arc length of 18.97 feet, through a central angle of 89°00'36", to the northerly right-of-way line of 5th Avenue;  
Thence along said northerly right-of-way line, South 89°00'36" West, 63.12 feet, to the westerly line of that certain parcel of land described in Document No. 2014-0231767, MCR;  
Thence leaving said northerly right-of-way line, along said westerly line, North 00°02'00" West, 50.01 feet, to the northerly line of said parcel;  
Thence leaving said westerly line, along said northerly line, North 89°00'35" East, 75.15 feet, to the Point of Beginning.

Containing 3,726 Square Feet or 0.086 Acres more or less.

**AW  
LAND  
SURVEYING, LLC**  
PO BOX 2170, CHANDLER, AZ 85244  
PH: (480) 244-7630  
darmijo@awlandsurvey.com



Job: 23-033  
SHEET 1 OF 2

7160 E. 5TH AVENUE  
SCOTTSDALE, ARIZONA

E 1/4 CORNER  
SECTION 22  
T2N, R4E  
FD MC BCHH

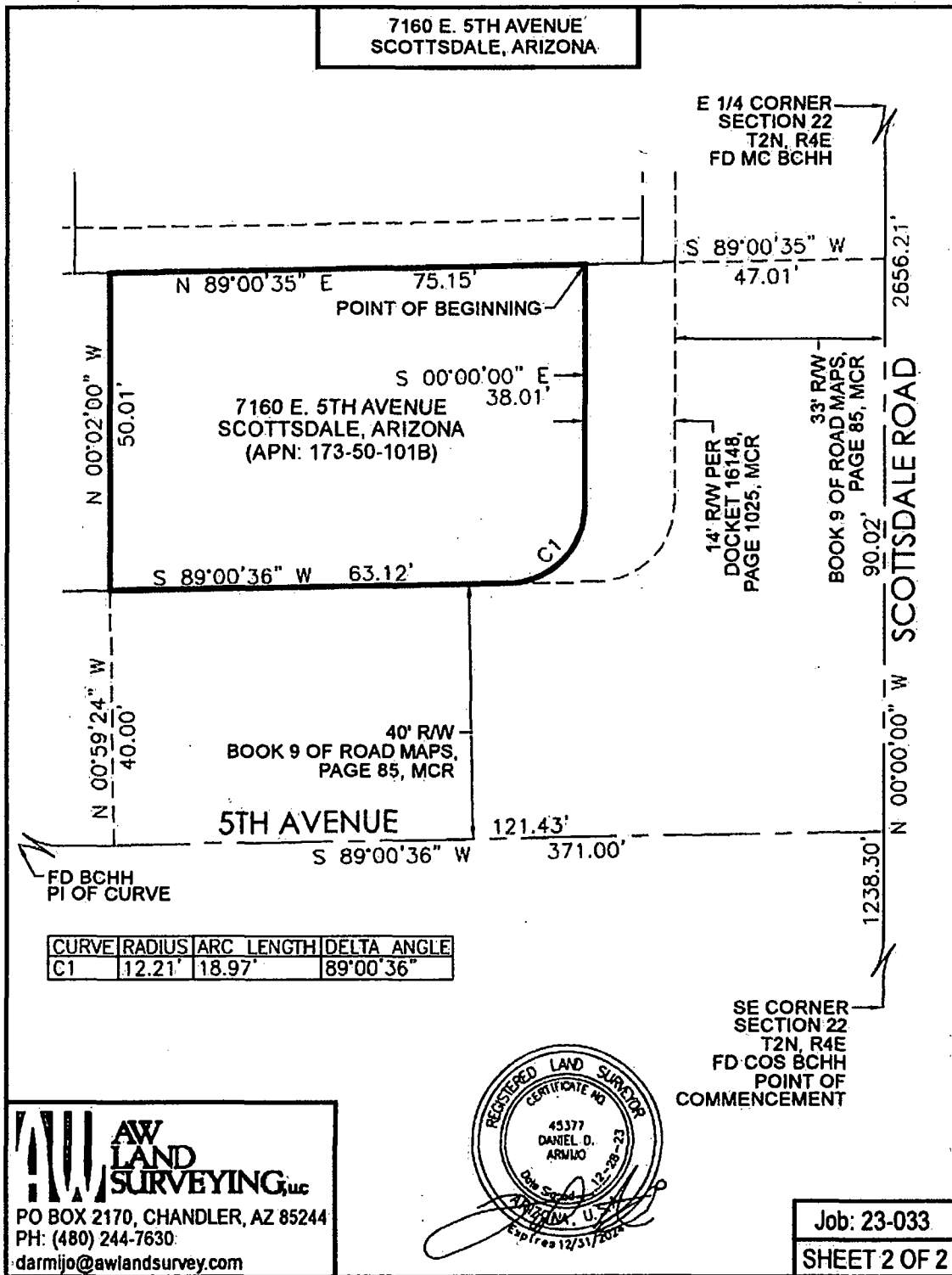


Exhibit B

Contract No. 2026-069-COS

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