

RECORDING REQUESTED BY: CITY CLERK  WHEN RECORDED RETURN TO:  City Clerk City of Cathedral City 68-700 Avenida Lalo Guerrero Cathedral City, CA 92234	          
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**CITY OF CATHEDRAL CITY  
IMPROVEMENT AGREEMENT  
PARCEL MAP 30726**

DATE OF AGREEMENT:		
NAME OF SUBDIVIDER: 63 MAXX DEVELOPMENT CATHEDRAL CITY, LLC a Wyoming Limited Liability Company (REFERRED TO AS "SUBDIVIDER")		
NAME/NUMBER OF PARCEL MAP AND OTHER APPROVALS: TENTATIVE PARCEL MAP NO. 30726 (REFERRED TO AS "SUBDIVISION")		
TENTATIVE MAP APPROVED BY CITY COUNCIL ON SEPTEMBER 28, 2005 (THE "APPROVAL ACTION") PROPERTY SUBJECT TO THIS AGREEMENT is described in Exhibit "A", attached hereto and incorporated herein (hereinafter the "Property")		
EST. TOTAL COST OF PUBLIC IMPROVEMENTS: \$ 929,400.00 see Exhibit "B"	EST. TOTAL COST OF PRIVATE IMPROVEMENTS: \$ 828,200.00 See Exhibit "B"	EST. TOTAL COST OF MONUMENTATION: \$ 10,000.00 See Exhibit "B"
SURETY COMPANY and BOND NUMBERS:  International Fidelity Insurance Company      Bond No. 0730414		

This Agreement is made and entered into by and between the **City of Cathedral City, California**, a municipal corporation of the State of California, hereinafter referred to as CITY, and **63 Maxx Development Cathedral City, LLC**, a Wyoming Limited Liability Company, hereinafter referred to as "SUBDIVIDER".

## RECITALS

A. Subdivider has presented to City an application for the construction of a commercial center on Date Palm Drive, southerly of Varner Road, and has submitted an application for the approval and recordation of a Tentative Parcel Map to divide the site of the commercial center into ten (10) parcels and to thereafter develop the site. The final Parcel Map and the development of the site are subject to the filing and recordation of a final parcel map, pursuant to provisions of the Subdivision Map Act of the State of California and the City's Ordinances and regulations relating to the filing, approval and recordation of subdivision maps. The Subdivision Map Act and the CITY's ordinances and regulations relating to the filing, approval and recordation of subdivision maps are collectively referred to in this Agreement as the "Subdivision Laws".

B. The City Council of the City of Cathedral City has reviewed the applications and has approved Tentative Parcel Map No. 30726 for the subdivision of the land, subject to the Subdivision Laws and to the requirements and conditions of approval imposed thereon by the Approval Action by the City Council on September 28, 2005. The tentative parcel map and all requirements and conditions imposed thereon by the Approval Action are necessary for the public health and safety and for the orderly development of the surrounding area, and are on file in the Office of the City Engineer and are incorporated into this Agreement by reference.

C. The Subdivision Laws establish as a condition precedent to the approval of a final map that Subdivider must have complied with the requirements of the Approval Action and must have either (a) completed, in compliance with City standards, all of the public and private improvement and work required by the Subdivision Laws or the Conditions of Approval or, (b) entered into a secured agreement with City to complete the public and private improvements within a period of time specified by City.

D. In consideration of the approval of the final parcel map for the subdivision and development by the City Council, Subdivider desires to enter into this Agreement, whereby Subdivider promises to install and complete, at Subdivider's own expense, all the public and private improvement work required by City in connection with the proposed subdivision. Subdivider has secured this Agreement by improvement security required by the Subdivision Laws and approved by the City Attorney.

E. Improvement Plans for the construction, installation, and completion of the improvements have been prepared by Subdivider and approved by the City Engineer. The Improvement Plans are on file in the Office of the City Engineer and are incorporated into this Agreement by this reference. All references in this Agreement to the Improvement Plans shall include reference to any specifications for the improvements as approved by the City Engineer.

F. An estimate of the cost for construction of the public and private improvements and performing land development work in connection with the improvements according to the Improvement Plans has been made and had been approved by the City Engineer. The estimated amounts are stated on Page 1 of this Agreement, and the basis for the estimate of the public and private improvements is attached as Exhibit "B" to this Agreement.

G. The City has adopted standards for the construction and installation of improvements within the City. The Improvement Plans have been prepared in conformance with the City standards in effect on the date of approval of the Conditions of Approval.

H. Within thirty (30) days after completion of the required improvements and their acceptance by City, certain survey monuments and markers as specified on the final parcel map shall be installed in accordance with the provisions of the State Subdivision Map Act and with the ordinances of the City.

I. Subdivider recognizes that by approval of the final parcel map, City has conferred substantial rights upon Subdivider, including the right to sell, lease, or finance lots within the parcel map, and that Subdivider has taken the final acts necessary to subdivide the property within the parcel map. As a result, City will be damaged to the extent of the cost of installation of the improvements by Subdivider's failure to perform its obligations under this Agreement, including, but not limited to, Subdivider's obligation to complete construction of the improvements by the time established in this Agreement. City shall be entitled to all remedies available to it pursuant to this Agreement and law in the event of a default by Subdivider. It is specifically recognized that the determination of whether a reversion to acreage or rescission of the lots and parcels within the parcel map constitutes an adequate remedy for default by the Subdivider shall be within the sole discretion of City.

NOW, THEREFORE, in consideration of the approval and recordation by the City Council of the final map for Parcel Map No. 30726, Subdivider and City agree as follows:

1. **Subdivider's Obligation to Construct Improvements.**

Subdivider shall:

(a). Comply with all the requirements and conditions in the Approval Action and any amendments thereto, and with provisions of the Subdivision Laws.

(b). Complete at Subdivider's own expense, all the public and private improvement work on as required on the Tentative Map of Parcel Map No. 30726, and in the Approval Action, all in conformance with approved Improvement Plans and the City standards, within **twenty-four (24) months** of the date of final parcel map approval by the City Council, or by the date of final City Building Division inspection and approval of any of the first two commercial buildings constructed within Parcel Map No. 30726, on any parcel or parcels, whichever date is the earliest.

(c). Furnish the necessary materials for completion of the public improvements in conformity with the Improvement Plans and City standards.

(d). Acquire and dedicate, or pay the cost of acquisition by City, of all rights-of-way, easements and other interests in real property for construction or installation of the public improvements, free and clear of all liens and encumbrances. The Subdivider's obligations with regard to acquisition by City of off-site rights-of-way, easements and other interests in real property shall be subject to a separate agreement between Subdivider and City. Subdivider shall also be responsible for obtaining any public or private drainage easements or authorizations to accommodate the development of the parcel map.

(e) Commence construction of the improvements and complete the improvements by the deadline stated in paragraph 1(b) above, unless a time extension is granted by the City as authorized in Section 19.

(f). Install all subdivision monuments, property corners, and other survey markers as shown on the recorded parcel map and required by law within thirty days after the completion of the public improvements and prior to their acceptance by the City.

## **2. Security**

(a). Subdivider shall at all times guarantee Subdivider's performance of this Agreement by furnishing to City, and maintaining, good and sufficient security as required by the Subdivision Laws, on forms approved by City for the purposes and in the amounts as follows:

(i). \$ 1,757,600.00 to assure faithful performance of this Agreement in regard to said improvements which is 100% of the estimated cost of the public and private improvements set forth in Exhibit "B"; and

(ii). \$ 878,800.00 to secure payment to any contractor, subcontractor, persons renting equipment, or furnishing labor materials for the improvements required to be constructed or installed pursuant to the Agreement, which is 50% of the estimated cost of the improvements, set forth in Exhibit "B" and

(iii). \$ 175,760.00 to guarantee or warranty the work done pursuant to this Agreement for a period of one year following acceptance thereof by City against any defective work or labor done or defective materials furnished, which is 10% of the estimated cost of the improvements set forth in Exhibit "B", which warranty security is to be provided to the City prior to the City's release of any bonds or securities filed with this Agreement; and

(iv). \$ 10,000.00 in cash, to assure the placement of permanent survey monuments, lot corners, stakes and markers as shown on the final parcel map, to provide centerline ties to the City Engineer, and to provide corner records to the County Surveyor, if applicable, and to guarantee payment to the licensed surveyor or civil engineer of record for the performance of these actions.

(b) The Improvement Securities required by this Agreement shall be kept on file with the City Clerk. If surety bonds are used, they must be issued by a surety company currently admitted to transact surety insurance business in California by the California Department of Insurance, with a Best's Insurance Guide rating of no less than "A-" ("A-minus"). The terms of any documents evidencing such Improvement Securities as set forth in this Section 2 or

referenced on Page One (1) of this Agreement, are incorporated into this Agreement by this reference as if set forth fully herein. If any Improvement Security is replaced by another type or kind of approved Improvement Security, subject to the approval of the form thereof by the City Attorney, the replacement shall be filed with City Clerk and, upon filing, shall be deemed to have been made a part of and incorporated into this Agreement. Upon filing of a satisfactory replacement Improvement Security with the City Clerk, the former Improvement Security shall be released.

(c) Subdivider agrees to keep its Improvement Securities in full force and effect until they are reduced or released by City. If any Improvement Security provided by Subdivider is cancelled or terminated for any reason by the action of a surety, financial institution or other party, it shall be the responsibility of the Subdivider to immediately, upon written notice from City, provide a substitute Improvement Security which conforms to all the requirements of this Section 2 in the same amount or amounts.

(d) Except as otherwise provided in this Agreement, any additions, changes, alterations, or modifications of this Agreement or to the Plans, Specifications and Improvements referred to herein, including any extension of time within which the work hereunder may be completed, shall not release or exonerate any surety or sureties on the Improvement Security given in connection with this Agreement.

### **3. Alterations to Improvement Plans; Modification of City Standards.**

(a) Any changes, alterations or additions to the Plans or to the Improvements, not exceeding 10% of the original estimated cost of the Improvements, which are mutually agreed upon by City and Subdivider, shall not require Developer to increase any Improvement Securities provided under this Agreement. In the event such changes, alterations, or additions exceed 10% of the original estimated cost of the Improvements, Subdivider shall provide additional Performance Security as required by Section 2 of this Agreement for 100% of the total estimated cost of the Improvements as changed, altered, or amended, minus any completed partial releases allowed by Section 6 of this Agreement. Subdivider shall also provide additional Labor & Materials Security as required by Section 2 of this Agreement for 50 % of the total estimated cost of the Improvements as changed, altered, or amended.

(b) Subdivider shall construct all Improvements in accordance with the City Standards in effect as of the date of the Approval Action specified on Page One (1) hereof. The City reserves the right to modify the Standards applicable to the subdivision created by the recordation of the parcel map and this Agreement, when necessary to protect the public safety or welfare or to comply with applicable State or Federal law or City zoning ordinances. If Subdivider requests and is granted an extension of time for completion of the Improvements, the City may apply the Standards in effect at the time the extension is granted.

#### **4. Modification of Drainage Plan.**

Subdivider agrees that if during the course of construction and installation of Improvements it shall be determined by the City Engineer that revision of the drainage plan is necessary in the public interest, it will undertake such design and construction changes as may be reasonable and as are indicated by the City Engineer and approved by City. Said changes, if any, shall be confined to the Property.

#### **5. Inspections; Final Acceptance and Certification of Improvements.**

(a) Subdivider shall at all times maintain proper facilities and safe access for inspection of the Improvements by City inspectors and to the shops wherein any work is in preparation.

(b) Upon completion of the Improvements covered in this Agreement, the Subdivider shall request a final inspection by the City Engineer or his/her authorized representative. Following receipt of such request, the City Engineer shall inspect the Improvements, make certain determinations and take certain actions as follows:

(i) If the City Engineer, or his/her authorized representative, determines that the Improvements requiring dedication to and acceptance by the City for public use (the "Public Improvements") have been completed in accordance with this Agreement, then the City Engineer shall certify the completion of the Public Improvements by placing a resolution on the next most convenient City Council agenda seeking: (1) formal acceptance of the Public Improvements; (2) release of the Improvement Securities; and (3) authorization to file and record a Notice of Completion. Said determination by the City Engineer and agendization of the acceptance and release shall not be unreasonably withheld or delayed. Any certification and/or acceptance of the Public Improvements shall not constitute a waiver of any defects by City.

(ii) For Improvements not requiring dedication to or acceptance by the City (the "Private Improvements"), the City Engineer or his/her authorized representative shall inspect such improvements, and/or shall have the discretion to accept a certification from Subdivider's registered civil engineer stating that the Private Improvements have been completed in accordance with the approved Plans, City Standards and the Tentative Map. If the City Engineer, or his/her authorized representative, makes a finding, based on his/her own inspection (and/or any certification submitted by Subdivider's registered civil engineer) that the Private Improvements have been installed and constructed in accordance with the approved Plans, City Standards and the Tentative Map, the City Engineer shall recommend certification of the completion of the Private Improvements by placing an item on the next most convenient City Council agenda requesting certification and authorization to release the Improvement Securities. Said determination by the City Engineer and agendization of the certification and release shall not be unreasonably withheld or delayed.

- (c) Subdivider shall bear all costs of inspection and certification of the Improvements.

**6. Release of Improvement Securities.**

Except as otherwise provided in this Agreement, the Improvement Securities shall be released only as specified in this Section:

(a) The Performance Security shall be fully released only upon the final completion and certification of all Public and Private Improvements, and after acceptance of the Public Improvements by the City Council. Partial releases may be permitted subject to the provisions of Subsections (a)(i) and (a)(ii) hereof. Upon final completion of the Public and Private Improvements under this Agreement, and after City Council acceptance/certification, the City shall file a Notice of Completion in accordance with the California Civil Code.

(i) The City Engineer may release a portion of the Performance Security, as work on the Improvements progresses, upon written application thereof by the Subdivider; provided, however, that no such release shall be considered by City until the value of the work remaining to be completed is twenty percent (20%) or less of the estimate of the total amount of work to be done as shown in Exhibit "B". Upon approval of a partial release or the reduction of Performance Security, the City shall not reduce such Performance Security to an amount less than two hundred percent (200%) of the value of the work remaining to be done. City and Subdivider agree that not more than two requests for reduction or partial release of Performance Security shall be considered between the start of construction and the completion and acceptance/certification of the Improvements by the City.

(ii) In no event shall the City Engineer authorize a release of the Performance Security which would reduce such security to an amount below that required to guarantee the completion of the Improvements and any other obligations imposed upon Subdivider by this Agreement.

(iii) No partial reduction or release of the Performance Security shall constitute or be construed as the City's acceptance of any Improvements or related work. Such partial reductions or releases (if any) will merely reflect that a certain portion of the required work has been done.

(b) The Labor & Materials Security shall, ninety (90) days after the City's recordation of the Notice of Completion described Subsection 6(a), be reduced to an amount equal to the total claimed by all claimants for whom liens have been filed and of which notice has been given to City, plus an amount reasonably determined by the City Engineer to be required to assure the performance of any other obligations secured by the Labor & Materials Security and to cover legal costs. The balance shall be released upon the settlement of all claims and obligations for which the Labor & Materials Security was given. If no claims or liens have been filed and no

notice has been given to City within said ninety (90) day period, then the Labor & Materials Security shall be released in full.

(c) The Warranty Security shall not be released until after the expiration of the one-year (1-year) warranty period and until any claims filed during the warranty period have been settled. As provided in Section 10, below, the warranty period shall not commence until final acceptance/certification of the Improvements and related work by the City Council.

(d) The Monumentation Security may be released in full by the City Engineer in accordance with the terms of the separate monument agreement with the City, or if there is none, upon submittal of the following:

(i) a written certification from the professional engineer or surveyor responsible for setting the monuments stating that all the final monuments, boundary corners and lot corners for the Subdivision have been set in accordance with the Professional Land Surveyors Act and the Subdivision Map Act, and that the professional engineer or surveyor has been paid in full by Subdivider for such services; and

(ii) centerline tie sheets prepared in a manner acceptable to the City Engineer showing the locations of centerline monuments in existing public or private streets.

(e) Except as otherwise provided in the Subdivision Laws (including, without limitation, Section 66499.19 of the California Government Code), the City may retain from any Improvement Securities released an amount sufficient to cover costs and reasonable expenses and fees actually incurred by the City, including reasonable attorneys' fees.

## **7. Injury to Public Improvements, Public Property or Public Utilities Facilities.**

Subdivider shall replace or repair, or cause the repair or replacement of any and all public or private improvements, public utilities facilities and survey or subdivision monuments which are destroyed or damaged as a result of any work done by Subdivider or its agents under this Agreement. Subdivider shall bear the entire cost of replacement or repairs of any and all public or private improvements or utility property damaged or destroyed by reason of any work done by Subdivider or its agents under this Agreement, whether such property is owned by the United States or any agency thereof, or the State of California, or any agency or political subdivision thereof, or by the City or any public or private utility corporation or by any combination of such owners. Any repair or replacement shall be made to the reasonable satisfaction, and subject to the approval of the City Engineer and the owner of any such public or private improvement.

## **8. Permits.**

Subdivider shall, at Subdivider's expense, obtain all necessary permits and licenses for the construction and installation of the Improvements, give all necessary notices and pay all fees and taxes required by law.



**9. Notice of Breach/Default of Subdivider.**

(a) Default of Subdivider shall include, but not be limited to:

(1) Subdivider's failure to timely complete construction of the Improvements;

(2) Subdivider's failure to timely cure any defect in the Improvements;

(3) Subdivider's failure to perform substantial construction work for a period of twenty (20) calendar days after commencement of the work;

(4) Subdivider's insolvency, appointment of a receiver, or the filing of any petition in bankruptcy either voluntary or involuntary which Subdivider fails to discharge within thirty (30) days;

(5) the commencement of a foreclosure action against the Property or a portion thereof, or any conveyance in lieu or in avoidance of foreclosure;

(6) Subdivider's failure to keep the Improvement Securities in full force and effect;

(7) Subdivider's failure to notify the City of any sale, transfer or other disposition of the Property to a purported new subdivider or developer;

(8) Subdivider's failure to maintain insurance; or

(9) the failure of Subdivider or Subdivider's contractors, subcontractors, agents or employees to comply with any other terms and provisions of this Agreement.

(b) In the event of any such default, the City Engineer or the City Council may serve written notice to Subdivider specifying in reasonable detail the nature of the default. Subdivider shall have thirty (30) days from receipt of said notice to cure the default; provided that, if the default is not reasonably susceptible to being cured within said thirty (30) days, Subdivider shall have a reasonable period of time to cure the default so long as Subdivider commences to cure the default within said thirty (30) days and diligently prosecutes the cure to completion.

(c) If following service of such written notice of default, Subdivider fails to cure or commence curing the default to the satisfaction of City within the cure period specified in Subsection 9(b), above, the City Engineer or the City Council may serve notice of Subdivider's default upon Subdivider and where applicable Subdivider's surety, or the holder(s) of any other Improvement Securities, in accordance with the notice provisions set forth in Section 21 of this Agreement.

(d) In the event of service of the notice of default specified in Subsection 9(c), above, Subdivider's surety shall have the duty to take over and complete the Improvements and related work required under this Agreement; provided; however, that if the surety, within twenty (20) days after the serving upon it of such notice of default, does not give the City written notice of its intention to take over the construction of said Improvements or does not, within ten (10) days after giving City notice of such election, commence to complete the Improvements, City may take over the work and prosecute the Improvements to completion, by contract or by any other method City may deem advisable, for the account and at the expense of Subdivider, and Subdivider's surety shall be liable to City for any costs or damages occasioned City thereby; and, in such event, City, without liability for so doing, may take possession of, and utilize in

completing the Improvements, such materials, appliances, plant and other property belonging to Subdivider as may be on the site of the work and necessary for the completion of same.

(e) The City reserves to itself all remedies available to it at law or in equity for Subdivider's default under this Agreement. The City shall have the right, subject to this Section, to draw upon or utilize the appropriate Improvement Securities to mitigate City's damages in event of default by Subdivider. The right of City to draw upon or utilize the Improvement Securities is additional to and not in lieu of any other remedy available to City. It is specifically recognized that the estimated costs and amounts of Improvement Securities may not reflect the actual cost of construction or installation of the Improvements, and therefore, City's damages for Subdivider's default shall be measured by the actual cost of completing the required Improvements. The sums provided by the Improvement Securities may be used by City for the completion of the Improvements in accordance with the Plans.

(f) Failure of Subdivider to comply with the terms of this Agreement, including but not limited to, construction of all the Improvements as set forth herein and as required by the Tentative Map, shall constitute Subdivider's consent to: (1) the filing by City of a notice of violation against all of the lots in the Subdivision; (2) a rescission by the City Council of the map approval; (3) action by City to otherwise revert the Subdivision to acreage; and (4) withholding of Building permits, utility connections and/or Certificates of Occupancy. The remedies provided by this Subsection (f) are in addition to and not in lieu of any other remedies available to City at law or in equity. Subdivider agrees that the choice of remedy or remedies for Subdivider's default or breach shall be in the sole discretion of City.

(g) In the event that Subdivider fails to perform any obligation hereunder, Subdivider agrees to pay all costs and expenses actually incurred by City in securing performances of such obligations, including costs of suit and reasonable attorney's fees.

(h) The failure of City to take an enforcement action with respect to a default, or to declare a default or breach, shall not be construed as a waiver of that default or breach, or of any subsequent default or breach of Subdivider. Any failure by the City to enforce any provision of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provision(s) and further shall not act to release any surety from its obligations under this Agreement.

## **10. Warranty.**

(a) For a period of one (1) year after final acceptance/certification by the City Council of the Improvements, Subdivider shall guarantee or warranty the Improvements against any defective work or labor done or defective materials furnished. If within the warranty period any work relating to the Improvements or any part of thereof furnished, installed, constructed or caused to be done, furnished, installed or constructed by Subdivider fails to fulfill any of the requirements of this Agreement or the Plans, Subdivider shall without delay and without any cost to City, commence to repair or replace or reconstruct any defective or otherwise

unsatisfactory part or parts of the work or structure within thirty (30) days of receiving written notice from City of the defect and diligently prosecute the repair or replacement work to completion.

(b) Should Subdivider fail to act promptly or in accordance with the repair/replacement requirements set forth herein, Subdivider hereby authorizes City, at City's option, to perform the repair/replacement work twenty (20) days after mailing written notice to Subdivider and to Subdivider's surety, and Subdivider agrees to pay City for the cost of such work.

(c) Should the City determine that an emergency or a threat to the public safety and welfare exists from the condition of the Improvements which require repairs, replacements or remedial measures to be made before Subdivider can be notified, City may, in its sole discretion, make the necessary repairs or replacements or perform the necessary work and Subdivider shall pay to City the cost of such repairs.

#### **11. Subdivider Not Agent of City.**

Neither Subdivider nor any of Subdivider's agents, officers, employees, or contractors are or shall be considered to be agents of City in connection with the performance of Subdivider's obligations under this Agreement.

#### **12. Injury to Improvement Work; Risk of Loss.**

Until such time as the Public Improvements are accepted by City, Subdivider shall be responsible for and bear the risk of loss to any of the Public Improvements constructed or installed and shall be responsible for the care, maintenance of and any damage to such Public Improvements. Neither City, nor any of its agents, officers or employees shall be liable or responsible for any accident, loss or damage, regardless of cause, happening or occurring to the Public Improvements specified in this Agreement prior to the completion and acceptance of the Public Improvements by City. All such risks shall be the responsibility of and are hereby assumed by Subdivider. Subdivider is responsible for and shall bear the risk of loss for all Private Improvements at all times.

#### **13. Other Agreements.**

Nothing contained in this Agreement shall preclude City from expending monies pursuant to agreements concurrently or previously executed between the Parties, or from entering into agreements with other subdividers for the apportionment of costs of water and sewer mains, or other improvements, pursuant to the provisions of City ordinances providing therefor, nor shall anything in this Agreement commit to any such apportionment.

**14. Subdivider's Obligation to Warn Public During Construction.**

Until final acceptance/certification of the Public Improvements pursuant to Section 5(b)(i), and final certification of construction of the Private Improvements pursuant to Section 5(b)(ii), Subdivider shall give good and adequate warning to the public of each and every dangerous condition existent in said Improvements, and will take all reasonable actions to protect the public from such dangerous conditions on or around the work site.

**15. Vesting of Ownership.**

Upon acceptance of the Public Improvements and related work on behalf of the City, and after recordation of the Notice of Completion, ownership of the Public Improvements and any improvement constructed on any public street or alleys pursuant to this Agreement shall vest in City.

**16. Indemnity/Hold Harmless.**

(a) Neither the City, nor any official, officer, employee, contractor or agent thereof, shall be liable for any injury to persons or property occasioned by reason of the acts or omissions of Subdivider, its agents, subcontractors or employees in the performance of this Agreement. Subdivider hereby agrees to, and shall defend (with legal counsel reasonably acceptable to the City) and hold harmless City, its elective and appointive boards, commissions and officers, and its agents, contractors and employees from and against any and all claims, demands, causes of action, damages, costs, expenses, actual attorneys' fees, consultant's fees, expert's fees, losses or liability, in law or in equity, of every kind and nature whatsoever arising out of or in connection with Subdivider's operations, or any subcontractor's operations, to be performed under this Agreement for Subdivider's or subcontractor's tort negligence including active or passive, or strict negligence, including but not limited to personal injury including, but not limited to bodily injury, emotional injury, sickness or disease, or death to persons and/or damage to property of anyone, including loss of use thereof, caused or alleged to be caused by any act or omission of Subdivider or any subcontractor, or anyone directly or indirectly employed by any of them or anyone for the full period of time allowed by law, with the exception of the sole negligence or willful misconduct of City.

(b) Subdivider's indemnity, defense and hold harmless obligations under this Section 16 are not conditioned or dependent upon whether City, or its elective and appointive boards, commissions and officers, or its agents, contractors and employees, prepared, supplied or reviewed any Plans or related specifications in connection with the Improvements, or whether City or Subdivider has insurance or other indemnification covering any of these matters.

(c) Subdivider's obligation to indemnify, hold harmless and defend City shall extend to injuries to persons and damages to or alleged taking of property resulting from the design or construction of the Improvements. City's acceptance and/or certification of the Improvements

shall not constitute an assumption by City of any responsibility or liability for any damage or alleged taking of property referenced herein. City shall not be responsible or liable for the design or construction of the Improvements constructed or installed pursuant to the Plans, unless the particular Improvement design was required by City over the written objection of Subdivider, which objection stated that the Improvement design was potentially dangerous or defective and set forth a safe and feasible alternative design. After City's acceptance/certification of the Improvements, Subdivider shall remain obligated to correct or eliminate all dangerous conditions caused by defects in design or construction; provided, however, that the Subdivider shall not be responsible for routine maintenance. Subdivider acknowledges and agrees that Subdivider shall be responsible and liable for the design and construction of the Improvements and other work done pursuant to this Agreement, and except as may be provided above, City shall not be liable for any acts or omissions in approving, reviewing, checking, correcting or modifying any Plans, or in inspecting, reviewing or approving any work or construction of Improvements. Subdivider's Improvement Securities shall not be required to secure, and shall not secure, Subdivider's obligations under this Section 16.

**17. Sale or Disposition of Subdivision; Assignment.**

(a) Subdivider acknowledges and agrees that sale, transfer or other disposition of the Property prior to completion of the Improvements required hereunder will not relieve Subdivider from the obligations set forth in this Agreement, and Subdivider shall be required to notify City sixty (60) day in advance of any sale or transfer of ownership of the Property or any proposed assignment of this Agreement. If Subdivider sells or otherwise transfers the Property to any other person or entity prior to final completion of the Improvements, or wishes to assign this Agreement, Subdivider may request a novation of this Agreement and a substitution of Improvement Securities by the new owner or proposed assignee (hereinafter collectively for purposes of this Section, "Successor"). Subdivider shall be required to provide any documentation reasonably required by City to determine the appropriateness of any proposed Successor.

(b) Any proposed Successor must demonstrate to the City its ability to perform and complete the obligations of Subdivider under this Agreement, as determined by objective standards of financial capability, creditworthiness and experience required for such performance, and the City shall have the right to compel the Successor to disclose all documents, information and other material which, in City's sole reasonable discretion, may establish or tend to establish that the proposed Successor meets the standards specified herein. Following approval by City and full execution of a novation (or other such release or assignment and assumption agreement(s) entered into by Subdivider, Successor and City), posting of satisfactory replacement Improvement Securities and submission of required insurance by Successor, City shall immediately release the Improvement Securities posted by Subdivider in accordance with the provisions of such novation (or other such release or assignment and assumption agreement entered into by Subdivider, Successor and City), and Subdivider shall have no further obligations under this Agreement except as otherwise provided in the novation

(or other such release or assignment and assumption agreement entered into by Subdivider, Successor and City).

**18. Time is of the essence in this Agreement.**

**19. Time for Completion of Improvements; Extensions.**

(a) Subdivider shall commence and diligently prosecute to completion construction of all the Improvements required by this Agreement. The time for completion of the Improvements as specified in Section 1(b) of this Agreement may be extended as permitted by City ordinance. The City Manager may grant an extension of time for such period as may be in the public interest upon the showing of the Subdivider of good cause. Any such extension granted shall be subject to the limitations and conditions set forth in Sections 19(b) and (c), below, and shall be made by a writing executed by the in a form as approved by the City Attorney.

(b) Any such extension may be granted without notice to Subdivider's surety and shall not affect the validity of this Agreement or release the surety or sureties on any Improvement Securities given for this Agreement. However, City reserves the right to require as part of any extension amendment a written assurance from the surety acceptable to the City Attorney that the Improvement Securities required by Section 2 of this Agreement shall remain enforceable throughout the term of any extension.

(c) The City Manager shall be the sole and final judge as to whether or not good cause has been shown to entitle Subdivider to an extension. In addition, the time for completion of the Improvements shall be extended for any delay resulting from an act of City, or from an act of God, which Subdivider could not have reasonably foreseen, or by storm or inclement weather which prevents the conducting of work, or by strikes, boycotts, similar actions by employees or labor organizations, which prevent the conducting of work, and which were not caused by or contributed to by Subdivider, provided that Subdivider provides City with written notice of the delaying event within fifteen (15) days of the commencement of the delay. In the event of such delaying event, Subdivider shall use all reasonable efforts to remedy same and resume completion of the Improvements as promptly as practicable.

(d) As a condition of granting an extension of time to complete the Improvements required by this Agreement, the City Manager may require Subdivider to furnish new or additional Improvement Securities guaranteeing performance of this Agreement as extended in an increased amount as necessary to compensate for any increase in construction costs as determined by the City Engineer.

**20. No Vesting of Rights.**

Performance by Subdivider of this Agreement shall not be construed to vest Subdivider's rights with respect to any change in any zoning or building law or ordinance.

**21. Notice.**

All notices required by or provided for under this Agreement shall be in writing and delivered in person or sent by certified or registered mail, postage prepaid and addressed as provided in this Section. Notice shall be effective on the date it is delivered in person, or, if mailed, on the date of deposit in the United States Mail. Notices shall be addressed as follows unless a written change of address is filed with City:

Notice to City:	City of Cathedral City 68-700 Avenida Lalo Guerrero Cathedral City, CA 92234 Attn: City Manager
With a Copy to:	Eric S. Vail, City Attorney Burke, Williams & Sorensen, LLP 1600 Iowa Ave, Suite 250 Riverside, CA 92507
Notice to Subdivider:	63 Maxx Development Cathedral City, LLC 1712 Pioneer Avenue, Suite 500 Cheyenne WY 82001
With a Copy To:	_____ _____ _____
Notice to surety:	_____ _____ _____ _____

**22. Severability.**

The provisions of this Agreement may be severed from the remainder of this Agreement in accordance with the provisions of this Section 22 and applicable law. If any portion of this Agreement is held invalid by a court of competent jurisdiction, the remainder of the Agreement shall remain in full force and effect unless amended or modified in writing by the mutual consent of the Parties.

## **23. Captions.**

The captions of this Agreement are for convenience and reference only and shall not define, explain, modify, limit, exemplify, or aid in the interpretation, construction or meaning of any provisions of this Agreement.

## **24. Insurance.**

(a) Subdivider shall, at all times upon commencement of the construction of the improvements and during the construction of the Improvements, obtain, carry, maintain, and keep in full force and effect, at its sole cost and expense, policies of insurance of the types and in at least the minimum amounts described below:

(i) Commercial General Liability policy with a minimum combined single limit of One Million Dollars (\$1,000,000) for each occurrence and Two Million Dollars (\$2,000,000) in the aggregate for bodily injury, death, personal injury and property damage arising out of or in connection with the activities of the Subdivider and its contractors and subcontractors in performance of the work under this Agreement. Coverage shall be at least as broad as Insurance Services Office Commercial General Liability coverage (Occurrence Form CG 0001) and shall, in addition to the other coverages specified in this subsection, include coverage for independent contractors, ongoing operations, products and completed operations, contractual liability and personal and advertising injury.

(ii) Commercial Vehicle/Automotive Liability policy covering personal injury and property damage, with minimum limits of One Million Dollars (\$1,000,000) per occurrence, combined single limit, covering any vehicle utilized by Subdivider, its officers, agents, employees, subcontractors or independent contractors in performing the work required by this Agreement.

(iii) Workers' Compensation and Employer's Liability policy for all Subdivider's employees, with Workers' Compensation limits as required by State law and Employer's Liability coverage of \$1,000,000 per accident for bodily injury or disease. In case any work is sublet, Subdivider shall require any contractor or subcontractor similarly to provide Workers' Compensation and Employer's Liability Insurance for all contractor's or subcontractor's employees, unless such employees are covered by the protection afforded by Subdivider.

(1) In case any class of employees engaged in work under this Agreement at the work site(s) is not protected under any Workers' Compensation law, Subdivider shall provide and shall cause each contractor or subcontractor to provide, adequate insurance for the protection of employees not otherwise protected.



(2) Subdivider hereby indemnifies City for any damages or claims resulting from failure of either Subdivider or any contractor or subcontractor to take out or maintain such liability or Workers' Compensation insurance.

(b) Insurer Rating; Acceptability. Except as set forth otherwise herein, the policies required by this Section shall be issued by a California-admitted insurer with a rating of at least a B+;VII in the latest edition of Best's Insurance Guide. A Commercial General Liability policy issued by an insurer that is on the California Department of Insurance's List of Approved Surplus Line Insurers ("LASLI") will be acceptable, if no coverage from an admitted insurer can be obtained by Subdivider, and further provided that such insurer maintains a Best's rating of at least "A-; X" and remains on the LASLI during the term hereof. Workers' Compensation coverage issued by the State Compensation Insurance Fund shall be acceptable if no other coverage can be obtained by Subdivider, and further provided such insurer remains admitted in California and is otherwise financially acceptable to City.

(c) Deductibles. Any deductibles or self-insured retentions must be declared in writing by Subdivider to City and subsequently approved by City prior to its execution of this Agreement and prior to commencement of any work hereunder. At City's option, Subdivider shall either reduce or eliminate the deductibles or self-insured retentions with respect to City, or Subdivider shall procure a bond guaranteeing payment of losses and expenses.

(d) Certificates and Endorsements Verification. Subdivider shall submit to the City original certificates of insurance and endorsements evidencing the coverages required by this Section. The certificates and endorsements for each insurance policy shall be signed by a person authorized by that insurer to bind coverage on its behalf. All certificates and endorsements must be approved by City Attorney prior to the City's issuance of any permits for work on or in Parcel Map No. 30726. The City reserves the right to require complete, certified copies of all required insurance policies at any time and/or to require Subdivider to shall provide reports or status updates to evidence compliance of its contractors and subcontractors with the provisions of this Section.

(e) Required Endorsements.

(i) The Commercial General Liability and Commercial Vehicle/Automotive Liability policies are to contain or be endorsed to contain the following provisions:

(1) Additional Insureds. The City of Cathedral City, its officials, officers, employees, agents and independent contractors shall be named as additional insured with respect to liability arising out of automobiles owned, leased, hired or borrowed by or on behalf of the Subdivider; and with respect to liability arising out of work or operations performed by or on behalf of the Subdivider including materials, parts or equipment furnished in connection with such work or operations.

(2) Primary Insurance. For any claims related to this project, the Subdivider's insurance coverage shall be primary insurance as respects the City of Cathedral City, its officials, officers, employees, agents and independent contractors. Any

insurance or self-insurance maintained by the City of Cathedral City, its officials, officers, employees, agents and independent contractors shall be excess of the Subdivider's insurance and shall not contribute with it. This endorsement is not applicable to the Commercial Vehicle/Automotive Liability Policy.

(3) Waiver of Subrogation. Endorsements waiving all rights of subrogation against the City of Cathedral City, its officials, officers, employees, agents and independent contractors shall be provided.

(ii) The Workers' Compensation policy shall be endorsed to waive all rights of subrogation against the City of Cathedral City, its officials, officers, employees, agents and independent contractors.

(f) Other Insurance Requirements. All policies required under this Agreement shall contain provisions stating that such policies cannot be canceled or reduced except on at least thirty (30) days prior written notice to Subdivider (ten (10) days' notice for cancellation due to non-payment). Subdivider further agrees to: (1) provide to City copies of any notices relating to cancellation or reduction of insurance within two (2) days of receipt; and (2) cause all certificates of insurance to include language indicating that the issuers or producers of such policies will endeavor to provide copies of any such notices directly to City.

(g) Commencement of Work. Subdivider shall not be issued permits to commence work under this Agreement until Subdivider has obtained all insurance required pursuant to this Section, and such insurance has been approved by City; nor shall Subdivider allow any contractor or subcontractor to commence work on the Improvements until all similar insurance required of the contractor or subcontractor has been obtained. Certificates, endorsements, and where applicable, full copies of policies shall be maintained on file with the City Clerk.

(h) Higher Limits. If Subdivider maintains higher limits than the minimums specified in this Section 24, the City requires and shall be entitled to coverage for the higher limits maintained by Subdivider. Any available insurance proceeds in excess of the specified minimum limits of insurance and coverage shall be available to the City.

## **25. Attorneys' Fees.**

In the event any action at law or in equity is brought to enforce the terms of this Agreement, the prevailing Party shall be entitled to litigation costs and reasonable attorneys' fees.

## **26. Incorporation of Recitals.**

The Recitals to this Agreement are hereby incorporated into the terms of this Agreement.

**27. Entire Agreement.**

This Agreement constitutes the entire agreement of the Parties and supersedes any prior written or oral agreements between them with respect to the subject matter hereof. All modifications, amendments, or waivers of the terms of this Agreement must be in writing and signed by the appropriate representatives of the Parties.

**28. Governing Law; Venue.**

This Agreement shall be governed by and interpreted in accordance with the laws of the State of California. In the event that suit shall be brought by either Party to this contract, the Parties agree that venue shall be exclusively vested in the State courts of the County of Riverside, California or where appropriate, in the United States District Court, Southern District of California, Riverside, California.

**29. Runs with the Land; Recordation.**

(a) The Parties agree that the terms and provisions set forth in this Agreement shall be deemed provisions, terms and/or covenants running with the Property in accordance with applicable law, including without limitation, California Civil Code section 1468, and shall pass to and be binding upon the heirs, successors and assigns of the Parties to this Agreement, and on any successor owner of the Property.

(b) The provisions of Subsection 29(a) notwithstanding, Subdivider shall remain jointly and severally liable with its heirs, successors, assigns or successor owners of the Property for the responsibilities and liabilities imposed by this Agreement unless a novation agreement is executed in accordance with the provisions of Section 17 of this Agreement.

(c) Upon execution, this Agreement shall be recorded in the Official Records of Riverside County, and by such recordation, it is the intention of the Parties to give notice to and bind their successors, heirs and assigns hereto.

**30. Authority of Executing Parties.**

Each person executing this Agreement on behalf of a Party represents and warrants that such person is duly and validly authorized to do so all behalf of the entity it purports to bind and that he/she is authorized to enter into contracts on behalf of Subdivider. The undersigned, on behalf of Subdivider, binds Subdivider, its partners, successors, executors, administrators, and assigns with respect to the terms and provisions of this Agreement.

**[END OF THIS PAGE; SIGNATURES ON FOLLOWING PAGE]**

IN WITNESS WHEREOF, this Agreement is executed by the Parties hereto on the date above first written.

Subdivider:

63 MAXX DEVELOPMENT CATHEDRAL CITY,  
LLC, a Wyoming Limited Liability Company

By:

David L. Browning  
David L. Browning

City:

CITY OF CATHEDRAL CITY  
A Municipal Corporation

\_\_\_\_\_  
Stanley E. Henry, Mayor

ATTEST:

\_\_\_\_\_  
Gary F. Howell, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
City Attorney

APPROVED AS TO CONTENT:

\_\_\_\_\_  
John A. Corella, City Engineer

APPROVED:

\_\_\_\_\_  
Charles P. McClendon  
City Manager

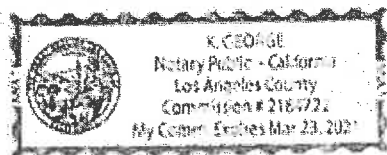
See Attached  
**NOTARIAL CERTIFICATE**

(Proper Notarization of Subdivider's Signature is required and shall be attached)

## California Jurat

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California  
County of Los Angeles



Place Notary Seal Above

Subscribed and sworn to (or affirmed) before me

on this 30 day of October, 2017,  
by

David L. Browning

proved to me on the basis of satisfactory evidence  
to be the person(s) who appeared before me.

Signature

A handwritten signature in dark ink, appearing to be 'K. George'.

Signature of Notary Public

### OPTIONAL INFORMATION

Although the information in this section is not required by law, it could prevent fraudulent removal and reattachment of this jurat to an unauthorized document and may prove useful to persons on the attached document.

### Description of Attached Document

Title or Type of Document

Document Date

Number of Pages

## EXHIBIT "A"

### Legal Description of Real Property Subject to this Agreement

Tentative Parcel Map No. 30726, comprised of the following real property in the City of Cathedral City, County of Riverside, State of California:

Parcel 1:

That portion of Government Lot 65, in Section 34, Township 3 South, Range 5 East, San Bernardino Meridian, according to United States Survey thereof, lying Northeasterly of the Northeasterly line of Date Palm Drive, conveyed to the County of Riverside by deed recorded April 22, 1964 as Instrument No. 49595, of Official Records.

Excepting therefrom that portion conveyed to Southern California Edison Company in deed recorded March 25, 1971, as Instrument No. 49934, of Official Records.

Also excepting therefrom all oil, gas and other mineral deposits, together with the right to prospect for, mine, and remove the same, according to the provisions of the Act of Congress approved June 1, 1938 (52 Stat. 609), as reserved in the Patent recorded June 20, 1960, as Instrument No. 54491, of Patents, records of Riverside County.  
(APN 659-230-039)

Parcel 2:

Those portions of Government Lots 65, in Section 34, Township 3 South, Range 5 East, San Bernardino Meridian, according to United States Survey thereof, lying Southeasterly of the Southeasterly line of Date Palm Drive, conveyed to the County of Riverside by deeds recorded April 14, 1964 as Instrument No. 46109 and April 22, 1964 as Instrument No. 49595, both of Official Records.

Excepting therefrom all oil, gas and other mineral deposits, together with the right to prospect for, mine, and remove the same, according to the provisions of the Act of Congress approved June 1, 1938 (52 Stat. 609), as reserved in the Patent recorded December 14, 1959, as Instrument No. 105806, June 20, 1960, as Instrument No. 54491, and March 23, 1964 as Instrument No. 35924, all of Official Records of Riverside County.  
(APN 659-230-004)

Parcel 3:

Those portions of Government Lots 66 and 67, in Section 34, Township 3 South, Range 5 East, San Bernardino Meridian, according to United States Survey thereof, lying Northwesterly of the Northwesterly line of Date Palm Drive, conveyed to the County of Riverside by deeds recorded April 14, 1964 as Instrument No. 46109 and April 22, 1964 as Instrument No. 49596, both of Official Records.

Excepting therefrom that portion lying Northeasterly of the Southwesterly line of Varner Road.

Also excepting therefrom all oil, gas and other mineral deposits, together with the right to prospect for, mine, and remove the same, according to the provisions of the Act of Congress

approved June 1, 1938 (52 Stat. 609), as reserved in the United States Patents recorded December 14, 1959 as Instrument No. 105806, June 20, 1960, as Instrument No. 54491, and March 23, 1964 as Instrument No. 35924, all of Official Records.  
(APN 659-230-003)

Parcel 4:

Government Lot 67, in Section 34, Township 3 South, Range 5 East, San Bernardino Meridian, according to United States Survey thereof.

Excepting therefrom that portion lying within Date Palm Drive, conveyed to the County of Riverside by deed recorded April 22, 1964 as Instrument No. 49596, of Official Records.

Also excepting therefrom that portion lying within Varner Road.

Also excepting therefrom that portion lying Northwesterly of Date Palm Drive.

Also excepting therefrom all oil, gas and other mineral deposits, together with the right to prospect for, mine, and remove the same, according to the provisions of the Act of Congress approved June 1, 1938 (52 Stat. 609), as reserved in the Patent recorded December 14, 1959, as Instrument No. 105806, of Patents, records of Riverside County.  
(APN 659-230-009 and -010)

Parcel 5:

The Southeast quarter of the Southeast quarter of the Southeast quarter of Section 33, Township 3 South, Range 5 East, San Bernardino Meridian.  
(said land is created and described as adjusted Parcel B in that certain Certificate of Compliance recorded November 1, 2002, as Instrument No. 2002-628165, of Official Records.)  
(APN 660-390-024)

(the above legal descriptions were taken from the Preliminary Report of Orange Coast Title Company, Order No. 140-1861364-66, dated June 16, 2017)

## **EXHIBIT "B"**

### **Summary of Estimated Costs of Improvements for PM 30726**

The following cost summary is based upon the attached Improvement Cost estimate worksheets prepared by David K. Rice dated June 14, 2017, and on the monumentation estimate submitted by David Rice of Coachella Valley Engineers, dated August 7, 2017, both on file in the office of the City Engineer.

1. Off-site (public) improvements:	
a. Street improvements:	\$ 623,850.00
b. Storm drain (inlets, pipe):	8,920.00
c. Signing, striping:	7,642.00
d. Water improvements:	68,822.00
e. Sewer improvements:	<u>65,300.00</u>
Subtotal:	\$ 774,534.00
Contingencies @ 20%:	<u>154,906.00</u>
Total:	\$ 929,440.00
Rounded:	<b>\$ 929,400.00</b>
2. On-site (private) improvements:	
a. Grading:	\$ 462,909.00
b. Storm drain (rip rap, basins, drywells):	215,040.00
c. Landscaping, irrigation:	<u>12,250.00</u>
Subtotal:	\$ 690,199.00
Contingencies @ 20%:	<u>138,040.00</u>
Total:	\$ 828,239.00
Rounded:	<b>\$ 828,200.00</b>
Grand Total—rounded:	<b>\$1,757,600.00</b>
Surveyor's Estimate for Monumentation:	<b>\$ 10,000.00</b>

### **IMPROVEMENT SECURITY SUMMARY:**

<b>FAITHFUL PERFORMANCE BOND: @100%</b>	<b>\$ 1,757,600</b>
<b>PAYMENT BOND (LABOR &amp; MATERIALS):@ 50%</b>	<b>\$ 878,800</b>
<b>WARRANTY BOND: @10%</b>	<b>\$ 175,760*</b>
<b>MONUMENT CASH SECURITY:</b>	<b>\$ 10,000</b>

\* Warranty bond to be posted upon completion of improvements

Attachments: Estimate Worksheets ( 8 pages)  
Surveyor's Estimate (1 page)