

## SETTLEMENT AGREEMENT

This Settlement Agreement (the "Agreement") is made and effective as of June 26, 2018 (the "Effective Date") by and between: (1) the State of Arizona and Mark Brnovich, Attorney General (collectively, "State") and (2) the City of Tempe, Arizona ("City"). The State and the City (collectively, the "Parties"), by and through their counsel, enter into this Agreement to fully and completely resolve the claims asserted in *State of Arizona, ex rel. Mark Brnovich, Attorney General v. City of Tempe*, No. CV-18-0128-SA (Supreme Court of Arizona) (the "Special Action"), with each side to bear its own fees and costs.

## RECITALS

WHEREAS, in 2010 the Arizona Legislature amended Arizona Revised Statutes ("A.R.S.") § 42-6203 to increase the generally applicable Government Property Lease Excise Tax ("GPLET") rate that applies to government-owned real property leased to private parties;

WHEREAS, the amended A.R.S. § 42-6203 also retained the lower, previous GPLET rate in § 42-6203(A) for certain circumstances ("Grandfathered GPLET Rate"), including where:

[A] development agreement, ordinance or resolution was approved by the governing body of the government lessor before June 1, 2010 that authorized a lease on the occurrence of specified conditions and the lease was entered into within ten years after the date the development agreement was entered into or the ordinance or resolution was approved by the governing body ... ;

WHEREAS, on May 20, 2010 the City adopted Resolution No. 2010.76 ("Resolution 76") which purported to authorize the City's mayor to execute one or more leases for each government property improvement located on real property within the City using the Grandfathered GPLET Rate subject to specified conditions;

WHEREAS, on November 9, 2017, the City adopted Ordinance No. O2017.48 (“Ordinance 48”), which authorized the mayor to execute a land and improvement lease with KBS II Fountainhead LLC at 1625 W. Fountainhead Parkway and relied on Resolution 76 to extend the Grandfathered GPLET Rate;

WHEREAS, on January 2, 2018 the State received a request for investigation pursuant to A.R.S. § 41-194.01 from Representative Vince Leach, requesting that the State investigate whether Ordinance 48 violated state law;

WHEREAS, the State conducted an investigation and, on February 1, 2018, issued its statutorily prescribed report, determining that Ordinance 48 may violate state law because it relied on Resolution 76, which is not a lease- or property-specific resolution, to extend the Grandfathered GPLET Rate;

WHEREAS, the Parties discussed whether the City would take actions to resolve the potential violations of state law short of the State filing a special action but were unable to reach an agreement;

WHEREAS, after issuing its statutorily prescribed report on February 1, 2018, the State became aware of additional development agreements that rely on Resolution 76 to potentially extend the Grandfathered GPLET Rate to additional future leases, including Development Agreements C2015-40 and C2016-142;

WHEREAS, on May 24, 2018 the State filed the Special Action in the Arizona Supreme Court against the City, as required by A.R.S. § 41-194.01(B)(2), so that the Supreme Court could “resolve the issue”;

WHEREAS, the Parties have considered the costs, delays, and legal uncertainties associated with litigating the Special Action and have reached an agreement to settle and resolve the same;

NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, the Parties agree as follows:

## **Section 1     Settlement Terms**

1.1 To fully and completely resolve the claims asserted in the Special Action, the City agrees not to rely on Resolution 76 as a basis for meeting the requirements under A.R.S. § 42-6203(A) to extend, use, impose, negotiate, or grant the Grandfathered GPLET Rate for leases not yet executed as of the Effective Date, including but not limited to the Land and Improvements Leases or Government Property Leases contemplated and referenced in Development Agreements C2015-40 and C2016-142 and all other similar leases that may be contemplated and referenced in already authorized or executed development agreements. Consistent with this:

(a) Neither the City, nor any of its current or future mayors, vice mayors, councilmembers, officers, attorneys, employees, or other agents, shall take any future action to approve, execute, or otherwise enter into any future lease that would result in the Grandfathered GPLET Rate being imposed, based in whole or in part, directly or indirectly, on Resolution 76;

(b) Neither the City, nor any of its current or future mayors, vice mayors, councilmembers, officers, attorneys, employees, or other agents, shall represent to any third party, orally or in writing, that the City (or any City agent on behalf of the City) has the authority to execute or otherwise enter into any future lease that would result in the Grandfathered GPLET Rate being imposed, based in whole or in part, directly or indirectly, on Resolution 76.

1.2 The Parties agree that the terms of this agreement are enforceable by any Party through declaratory and injunctive relief, and that irreparable harm warranting injunctive relief would result if any of the terms of this Agreement were breached by either Party.

1.3 In order to effectuate the terms of this agreement and help obviate the need for expedited legal proceedings, the City shall provide written notice to the State of the

City's intent to extend, use, impose, negotiate, or grant the Grandfathered GPLET Rate for a lease within the City. This written notice shall be provided at least 21 days before the City takes any action to extend, use, impose, negotiate, or grant the Grandfathered GPLET Rate for any such lease. The City shall send such notice to:

Office of the Arizona Attorney General  
ATTN: Evan Daniels  
Civil Litigation Division  
Government Accountability & Special Litigation Unit  
2005 N. Central Ave.  
Phoenix, AZ 85004  
Evan.Daniels@azag.gov

1.4 Notice pursuant to paragraph 1.3 is not required regarding a lease authorized under the following City resolutions: Resolution 2010.66; Resolution 2010.67; Resolution 2010.68; Resolution 2010.69; Resolution 2010.70; Resolution 2010.71; Resolution 2010.72; Resolution 2010.73.

1.5 Within three (3) business days after the Effective Date, the State will voluntarily dismiss the Special Action.

1.6 The Agreement resolves all claims asserted in the Special Action.

1.7 Each Party will bear its own fees and costs relating to the Special Action.

1.8 This is a fully integrated settlement agreement. This document contains the entire agreement of the Parties with respect to its subject matter, and all prior oral or written agreements, contracts, negotiations, representations and discussions, if any, pertaining to this matter are merged into this Agreement. No Party to this Agreement has made any oral or written representation other than those set forth in this Agreement, and no Party has relied upon, or is entering into, this Agreement in reliance upon any representation other than those set forth in this Agreement. This Agreement may not be modified in any respect except by a written amendment signed by all Parties.

1.9 This Agreement shall bind and inure to the benefit of the Parties hereto. Each of the signatories of this Agreement represents and warrants that it, he, or she is

authorized by it, his or her respective clients or principal to execute this Agreement and to bind the corresponding Party hereto.


1.10 This Agreement may be executed in multiple counterparts and, when one counterpart is signed by a Party's signatory, all such counterparts shall constitute, when taken together, one and the same instrument as if all signatures were contained in one original. A copy of a signature has the same effect as an original.

1.11 Each Party acknowledges and agrees that this Agreement was negotiated at arms' length and shall not be construed against its drafter as each Party participated equally in its drafting.

APPROVED:

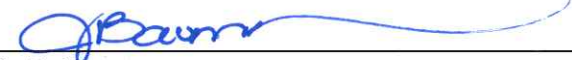
COUNSEL FOR STATE OF ARIZONA, *ex*  
*rel.* MARK BRNOVICH, ATTORNEY  
GENERAL

Dated: June 26, 2018

By:   
Evan G. Daniels  
Assistant Attorney General

COUNSEL FOR CITY OF TEMPE

Dated: June 25, 2018

By:   
Judith R. Baumann  
Tempe City Attorney