

# **DEVELOPMENT, OPERATING AND MAINTENANCE LEASE AGREEMENT**

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THIS DEVELOPMENT, OPERATING AND MAINTENANCE LEASE AGREEMENT (“Lease”) is made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, 2021 (“Effective Date”) by and between the City of Maricopa, an Arizona municipal corporation (“City”), and PHX Surf, LLC, an Arizona limited liability company (“Tenant”). City and Tenant are sometimes individually referenced herein as a “Party” or collectively as the “Parties”.

## **RECITALS**

WHEREAS, City is the owner in fee simple of the Property generally located at the southwest corner of SR 238 and N. Loma Road in the City of Maricopa, Arizona; and

WHEREAS, on February 25, 2021 the City issued an Invitation for Bids for the purchase, lease and development of all or a portion of real property, including the Property that is the subject hereof; and

WHEREAS, Tenant responded to the Invitation for Bid proposing a facility to offer a world class surf experience along with play pools and related amenities to offer food, beverage, retail and outdoor recreational elements; and

WHEREAS, the City Council finds that the public interest will be benefited by leasing a portion of Property to Tenant for the construction, operation and maintenance of a First-Class surf facility along with play pools and related amenities to offer food, beverage, retail and outdoor recreational elements; and

WHEREAS, it is the intent of Tenant to develop a First-Class facility as described herein on the Property.

## **AGREEMENTS**

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

**1. Certain Definitions.** When capitalized in this Lease, the following terms will have the following meanings.

1.1. “Base Rent” shall have the meaning set forth in Section 8.1.

1.2. “First-Class” means the standards for maintenance and operations of the Tenant Improvements for a first-class facility of similar quality such as Golf Land Sun Splash, Big Surf or Wet-n-Wild, which is meant to convey the quality of operations and maintenance and not the specific type of uses or facility.

1.3. “Construction Phase” means the period of time from the Effective Date until the Operations Phase Commencement Date during which phase Tenant will construct the Tenant

Improvements. The Construction Phase may be divided into sub-phases, subject to the prior written approval of City's Representative.

1.4. "Development Requirements" means the requirements set forth in the City Zoning Code, the City building code and other City technical codes, and other applicable state, federal and local laws governing the development of the Permitted Uses.

1.5. "Effective Date" means the date set forth in the introductory paragraph.

1.6. "Final Site Plan" means the final site plan approved by the City pursuant to the City Zoning Code.

1.7. "Furniture, Fixtures and Equipment" means movable furniture, fixtures or other equipment that have no permanent connection to the structure of a building or utilities and that are necessary or convenient to sustain the uninterrupted operations.

1.8. "City Council" means the City Council of the City of Maricopa, Arizona.

1.9. "City's Representative" shall have the meaning set forth in Section 2.4.

1.10. "Major Maintenance" means any repair or modification exceeding \$25,000 for each occurrence.

1.11. "New Parking Improvements" means the new parking spaces depicted on the Final Site Plan and described in Section 3.2.

1.12. "Operations Phase" means the period of time from the Operations Phase Commencement Date until the end of the Lease Term or Extended Term as set forth in Section 7.

1.13. "Operations Phase Commencement Date" means the first day the Tenant Improvements are open to the public, which shall in no event occur any later than thirty-six (36) months from the Effective Date unless extended pursuant to Section 6.

1.14. "Permitted Uses" means the uses set forth on Exhibit C attached hereto and incorporated herein.

1.15. "Preliminary Site Plan" means the preliminary site plan approved by the City.

1.16. "Property" means the real property described in Exhibit A and shown on Exhibit B attached hereto and incorporated herein.

1.17. "Schedule of Development" means the schedule for development of the Tenant Improvements, which shall include, but not be a limited to, a detailed description of the Tenant Improvements and a timeline for such improvements to be open and operating, and will be submitted by Tenant and approved by the City Manager, in the City Managers reasonable discretion, prior to the commencement of any work on the Property. Once approved, the Schedule of Development shall be attached hereto as Exhibit E and incorporated herein.

1.18. “Tenant Improvements” means the improvements described on Exhibit D attached hereto and incorporated herein.

1.19. “Tenant Maintenance Obligation Standards” means the standards of maintenance of the New Parking Improvements and Tenant Improvements consistent with a First-Class facility of similar quality, or as otherwise agreed in writing by the Parties.

1.20. “Tenant’s Representative” shall have the meaning set forth in Section 2.4.

1.21. “Unavoidable Delay” means the occurrence of an event described in Section 15 of this Lease.

1.22. “Violation of Community Decency Standards” means promotion of religious messages; advertising alcohol, tobacco, e-cigarettes, nudity, sexual materials, medical or recreational marijuana or firearms; false, misleading or deceptive advertising as determined by City, promotion or depiction of an illegal activity; advertising harmful to minors as defined in A.R.S. Title 13, Chapter 35; depictions of violence or anti-social behavior as determined by City; advertising that includes language which is obscene, vulgar or profane; attacks on ethnic, racial, religious, or other protected groups; and advertising that infringes on trademarks or copyrights.

## **2. Lease.**

2.1. The Property. City hereby leases the Property to Tenant for the Permitted Uses subject to all terms and conditions of this Lease.

2.2. Permitted Uses. The Property shall be used only for the construction, operation and maintenance of the Permitted Uses set forth in Exhibit C. Permitted Uses include the following incidental uses in furtherance of the Permitted Uses: (i) contracting with third parties to provide restaurant, food and beverage services; and (ii) selling novelties, souvenirs, and merchandise on the Property in compliance with applicable City codes and policies. All other uses shall require the approval of the City Council. Tenant shall pay any and all expenses for, relating to or arising from the Permitted Uses, including but not limited to employee expenses, equipment, goods, advertising and promotional costs. Revenue received by Tenant from the Permitted Uses shall be revenue of Tenant.

2.3. Changes to Permitted Uses. The City recognizes that water sports activities are subject to ever-changing conditions, trends, fads and uses that may affect the sustainability of the facility over the Lease Term (including any extensions thereof) and that may have a significant impact of the operations of Tenant. With the prior written consent of City, Tenant may redevelop the Property from time to time during the Lease Term by taking all steps required by the City Zoning Code in order to plan and construct replacement aquatic facility uses as approved by City.

2.4. Parties’ Representatives. City’s Representative shall be the City Manager. Tenant’s Representative shall be Erin La Grassa. Either Party may change such designation by written notice to the other. The Parties representatives shall be copied on all formal notices provided to the Parties pursuant to the requirements of Section 18.

2.5. Additional Agreements. In consideration of the benefits to be received from City by Tenant under the terms and conditions of this Lease, Tenant agrees to the following:

2.5.1. Hours of operation. The Tenant Improvements are allowed to be open to the public within the following times: Sunday through Thursday 5:30 AM – 10:00 PM and Friday and Saturday 5:30 AM until midnight and at no time shall Tenant be open less than seventy (70) hours per week, excluding a list of holiday closings provided by Tenant. These hours of operation may be amended if prior written agreement is received from City or if Tenant obtains a special event permit from the City. It is understood and agreed upon that certain weather conditions, natural disasters and other events beyond Tenant's control may arise which force Tenant to temporarily close the Tenant Improvements for limited amounts of time due to safety reasons. Tenant agrees to reopen the Tenant Improvements as soon as reasonably possible once the unsafe condition has ended.

2.5.2. City Use. City may use, on a non-exclusive basis, the Tenant Improvements up to five (5) times per calendar year. In addition, City and Tenant will reasonably cooperate with scheduling the use of the Tenant Improvements for future City recreation programs. City's Representative and Tenant's Representative shall mutually agree on the schedule for such use by City, such dates to be mutually approved by the Parties and shall not be the dates of Tenant's most profitable or busiest operational days. The City's allowed days of use shall not be cumulative and shall not carry over to the following calendar year.

2.5.3. City Resident Discount. Tenant shall extend a minimum ten percent (10%) discount to City residents for the Permitted Uses listed on Exhibit C as amended from time to time, with the exception of those Permitted Uses so noted on said exhibit. The ten percent (10%) discount shall not be required if the price is already discounted by a promotion or a bundled package, provided that the promotion or bundled package is at least 10% off the regular price. The City resident discount does not apply to corporate event rentals.

2.5.4. Access for Public Use. Tenant shall provide designated areas within the Property which will be free and open to the public, as designated on Exhibit B. This area will be available for public recreational usage during open business hours. Tenant shall be solely responsible for providing, at its sole cost and expense, sufficient numbers of on-duty lifeguards and the provision of all other necessary life safety services during all periods the Property is open for public use. The size and location of the designated public areas shall be as agreed by City and Tenant and shall be depicted on the Preliminary Site Plan and Final Site Plan.

### **3. Construction of Improvements.**

3.1. Tenant Improvements. Tenant shall, at its sole cost and expense, construct the Tenant Improvements in accordance with the Development Requirements and the Final Site Plan. Prior to construction of the Tenant Improvements, City Planning and Zoning Commission design review approval shall be obtained pursuant to the City Zoning Code. Construction of the Tenant Improvements shall commence on or before the date that is set forth in the Development Schedule to be attached as Exhibit E and shall be completed within thirty-six (36) months after that date. In the event Tenant determines that the Final Site Plan approved by the Planning and Zoning Commission will cause the operation of the Tenant Improvements to be unsuccessful, Tenant may

terminate this Lease by providing written notice to City within thirty (30) days following City's approval of the Final Site Plan. In the event commencement or completion of construction of the Tenant Improvements is delayed by Unavoidable Delay, the Development Schedule shall be extended for the verifiable number of days of the Unavoidable Delay. Following completion of the Tenant Improvements, Tenant shall deliver to City a dated statement enumerating the final cost of construction and installation of all Tenant Improvements.

3.2. New Parking Improvements. The Property at build-out will include the requisite parking spaces as depicted on the Final Site Plan approved by the City. The use of such spaces shall be non-exclusive to Tenant and shall be maintained by Tenant in compliance with the Tenant Maintenance Obligation Standards or such other standards as agreed by the Parties.

#### **4. Development of the Property.**

4.1. Development. Tenant shall develop the Property in accordance with the Development Requirements, Permitted Uses, the Tenant Improvements, and the Final Site Plan. Any additions to the Permitted Uses shall require the written consent of City's Representative.

4.2. Site Plans. The Preliminary Site Plan and Final Site Plan, or any amendments thereto, requires the approval of the City Planning and Zoning Commission as set forth in Section 3.1.

4.3. Signage. Tenant shall be entitled to signage on the Property in accordance with the City's Zoning Code. The number, size, type and specific location of sign(s) are subject to approval by the City and shall comply with the requirements of the City Zoning Code. City shall maintain landscape planting and maintenance to City public right of way standards.

4.4. Right to Inspect. Following construction of any Tenant Improvements, City will inspect the Improvement for compliance with the Development Requirements. In addition, City may inspect the Property, Tenant Improvements and all Furniture, Fixtures and Equipment to determine that such are properly operated and maintained, in a neat and orderly condition consistent with the requirements of this Lease. The results of this inspection will be made available to Tenant.

#### **5. Maintenance and Operation.**

5.1. Maintenance and Operation. Tenant shall be solely responsible for the maintenance and operation of the Tenant Improvements in a First-Class manner, and shall ensure compliance with the Americans with Disabilities Act (ADA) and Americans with Disabilities Act Accessibility Standards. Tenant shall be solely responsible for complying with the Tenant Maintenance Obligation Standards. Upon request of City, Tenant shall submit to City's Representative throughout the Lease Term, a report which describes the Major Maintenance work performed and the costs incurred (on a time and materials basis) in maintaining the Tenant Improvements. Tenant shall be solely responsible for providing, at its sole cost and expense, sufficient numbers of on-duty lifeguards and the provision of all other necessary life safety services during all periods the Property is open for use.

5.2. Reporting Complaints. Tenant's Representative shall inform City's Representative in writing of customer complaints regarding Tenant's standards of service, appearance of the facilities, or other standards of operation as soon as it is reasonable to do so. Likewise, City's Representative shall inform Tenant's Representative of customer complaints in a timely manner so that Tenant has the reasonable opportunity to resolve them.

5.3. Reporting Incidents and Injuries. Tenant's Representative shall: (a) within twenty-four (24) hours following an occurrence, provide a written report to City's Representative of all incidents occurring on the Property which involve injury or illness resulting in transport to a medical facility or death of a person, and (b) within seventy-two (72) hours following occurrence, provide a written report to City's Representative of all other injuries or illnesses requiring treatment beyond first-aid and other incidents occurring on the Property (including without limitation occurrences of crime and/or property damage).

## **6. Commencement of Operations.**

The Operations Phase Commencement Date shall be on or before thirty-six (36) months from the Effective Date unless: (i) the City Council and Tenant agree in writing to extend this date, or (ii) the commencement of construction is delayed by an Unavoidable Delay or as otherwise specifically described in this Lease.

## **7. Term.**

7.1. This Lease shall have two phases – the Construction Phase and the Operations Phase. The term of the Construction Phase shall commence on the Effective Date and shall terminate on the Operations Phase Commencement Date. The term of the Operations Phase shall be for fifty (50) years, commencing on the Operations Phase Commencement Date, and ending fifty (50) years from the Operations Phase Commencement Date, unless terminated earlier as provided for herein. In the event the Operations Phase Commencement Date is by Unavoidable Delay, then the term of the Operations Phase shall be extended as set forth in Section 3.1. Provided that Tenant is not then in default of this Lease, Tenant may extend the term of the Lease for up to five (5) separate additional ten (10) year terms (each an "Extended Term") with written consent of City which shall not be unreasonably withheld. The Construction Phase, Operations Phase and any Extended Term shall be jointly referred to herein as the "Lease Term" or "Term." If Tenant desires to extend the Lease Term, it shall give City written notice at least sixty (60) days, but not more than one (1) year, prior to the expiration of the then-current Term.

7.2. Each Extended Term shall be upon the same terms and conditions as this Lease; provided, however, that the Parties may agree in writing to modify the rental amount set forth in Section 8. If dispute resolution is elected by Tenant or City pursuant to Section 27, the Lease Term or any Extended Term shall be extended until conclusion of mediation.

## **8. Rental Amount.**

8.1. Base Rent. The Base Rent shall be calculated at \$1.50 per square foot of the Property over the Lease Term along with three percent (3%) interest compounded annually during the Construction Phase. The payment of Base Rent shall not commence until the first full month following the Operations Phase Commencement Date, but in no event any later than 36 months

after the Effective Date. The Parties hereby acknowledge and agree that the Base Rent shall be \$1,427.98 as more specifically shown in the amortization schedule attached hereto as *Exhibit F*

8.2. Payment. The Base Rent payable under Section 8.1 shall be paid to City in advance on the first day of each and every calendar month during the Term, commencing on the Operations Phase Commencement Date, or as set forth above in Section 8.1, without prior demand and without any deduction or setoff whatsoever. The Base Rent for any fractional part of a month at the end of the Term of this Lease shall be a proportionate part of the monthly Base Rent for a full month.

8.3. Late Payments. All sums owed under this Lease, if not received by City within ten (10) days after they become payable will be charged a late payment fee of five percent (5%) of the sum due and payable. An additional one and one-half percent (1 ½%) late payment fee will be charged on the balance due City for each additional month, or fraction thereof, until the date said sums are paid. Nothing in this Section 8.4 shall prohibit City from terminating this Lease for Tenant's failure to pay any rental payments pursuant to Section 12.

8.4. Books and Records. Tenant shall keep and maintain at a location approved by City's Representative, which location shall be the corporate offices for Tenant, so long as those offices remain in the state of Arizona, books and records that accurately reflect all revenue Tenant generates from the operation of the Permitted Uses. City and its duly authorized accountants, attorneys or other representatives shall have the right during the Term hereof, and for a period of five (5) years thereafter, to inspect and audit at reasonable times during normal business hours such books and records and to make copies thereof at City's expense. City shall make any request to audit and inspect the books in writing fifteen (15) days prior to the desired audit and inspection date.

## **9. Entry by City.**

9.1. Entry. Upon written notification to Tenant, City may, without abatement of rent or other charges due hereunder from Tenant, enter upon or have its agent enter the Property for purposes of inspection and to verify compliance with this Lease. Any such inspection shall be scheduled with the Tenant corporate office at least seven (7) days prior to the requested inspection date. Inspections shall be scheduled during a time that said inspection would have minimal impact on the operations of the Tenant business.

9.2. Waiver of Claims. Tenant hereby waives any claim for damage for any injury or inconvenience to, or interference with, Tenant's business, any loss of occupancy or quiet enjoyment of the Property, and any other loss occasioned by City's entry unless such claim is a direct result from City's negligent or willful misconduct. City shall have the right to use any and all means which City may deem proper to open any doors in an emergency in order to obtain entry to the Property and any entry into the Property obtained by City by any of said means, or otherwise, shall not under any circumstances be construed or deemed to be a forcible, unlawful, negligent entry into, and shall not be construed or deemed as conduct intended to cause damage

or injury, or a detainer of the Property or an eviction of Tenant from the Property or any portion thereof.

## **10. Utilities.**

Tenant shall, at its expense, separately meter charges for the consumption of electricity, water, gas and all other utilities associated with its use of the Property and shall timely pay all costs, including connection fees, associated therewith. Tenant shall be responsible for any and all utility connections.

## **11. Default.**

11.1. Tenant Default and Opportunity to Cure. Each of the following shall constitute an event of default of this Lease by Tenant:

11.1.1. The failure of Tenant to pay any installment of Base Rent pursuant to Section 8.1 or any other amount due from Tenant hereunder, provided that Tenant does not cure such failure within five (5) days after delivery of a written notice of such failure given in accordance with Section 18. Tenant shall have the right to request and City shall provide within ten (10) days of such request a written instrument stating whether Tenant has made all rent payments and whether there is any default.

11.1.2. The failure of Tenant to perform any of its other obligations under this Lease, provided that Tenant does not cure such failure within thirty (30) days after delivery by City of a written notice specifying in detail the nature and extent of such default and given in accordance with Section 18; provided, however, if a cure of the default reasonably requires more than thirty (30) days to complete, then the time to cure shall be extended so long as the cure is being diligently pursued, by reasonable determination of City.

11.2. City Default and Opportunity to Cure. Each of the following shall constitute an event of default of this Lease by City.

11.2.1. The failure of City to perform any of the obligations of City set forth in this Lease, provided that City does not cure such failure within thirty (30) days after delivery by Tenant of a written notice specifying in detail the nature and extent of such default and given in accordance with Section 18; provided, however, if a cure of the default reasonably requires more than thirty (30) days to complete, then the time to cure shall be extended so long as the cure is being diligently pursued.

## **12. Remedies; Termination.**

12.1. Event of Default by Tenant. If any default by Tenant shall continue uncured after notice of default and the expiration of the cure period permitted by this Lease, City shall have the following remedies, in addition to all other rights and remedies provided under this Lease, or by law or equity, to which City may resort cumulatively or in the alternative:

12.1.1. Termination. City may at its election terminate this Lease by giving Tenant notice of termination. On the giving of the notice, all Tenant's rights in the Property and



Tenant Improvements shall terminate. Promptly after the receipt of notice of termination, Tenant shall surrender and vacate the Property and Tenant Improvements in broom-clean condition and City may re-enter and take possession of the Property and Tenant Improvements and, in City's sole discretion, eject all parties in possession or eject some and not others or eject none. Termination under this Section 12.1.1 shall not relieve Tenant from the payment of any sum then due to City or from any claim for damages previously accrued or then accruing against Tenant. If City terminates this Lease, City shall be entitled to recover from Tenant: (a) the worth at the time of termination of the unpaid Base Rent and all other sums payable by Tenant to City pursuant to this Lease (collectively, "Rent") which had been earned at the time of termination; (b) the worth at the time of termination of the amount by which the unpaid Rent which would have been earned after termination exceeds the amount of such loss that Tenant proves could have been reasonably avoided; (c) the worth at the time of termination of the amount by which the unpaid Rent for the balance of the Term after the time of termination exceeds the amount of such loss that Tenant proves could have been reasonably avoided; and (d) any other amount necessary to compensate City for all detriment proximately caused by Tenant's failure to perform its obligations under this Lease or which in the ordinary course of things would be likely to result therefrom, including the cost of recovering possession of the Property and Tenant Improvements, expenses of reletting, including necessary repair, renovation and alteration of the Tenant Improvements, reasonable attorneys' fees, broker's commissions, and any other reasonable costs.

The "worth at the time of termination" of the amounts referred to in subsections (a) and (b) above shall be computed by allowing interest at ten percent (10%) per annum from the dates such amounts accrued to City. The worth at the time of termination of the amount referred to in subsection (c) above shall be computed by discounting such amount at one (1%) percentage point above the discount rate of the Federal Reserve Bank of San Francisco at the time of termination.

12.1.2. Re-Entry without Termination. City may re-enter the Property and, without terminating this Lease, at any time and from time to time relet the Property and Tenant Improvements or any part(s) of them for the account and in the name of Tenant or otherwise. City may, in its sole discretion, eject all persons or eject some and not others or eject none. City shall apply all rents from reletting: first, to payment of all reasonable expenses (including attorneys' fees or broker's commissions) paid or incurred in connection with recovering the Property and Tenant Improvements, placing them in good condition, and preparing them for reletting; second, to reasonable expenses of securing new subtenants; third, to the fulfillment of Tenant's covenants, including the payment of Rent, to the end of the Term; and fourth, to City. Any reletting may be for the remainder of the Term or for a longer or a shorter period, as City may determine in its sole and absolute discretion. City may execute any leases made under this provision either in City's name or in Tenant's name and shall be entitled to all rents from the use, operation, or occupancy of the Property and Tenant Improvements. Tenant shall nevertheless pay to City on the due dates specified in this Lease the equivalent of all sums required of Tenant under this Lease (including all Rent), plus City's expenses, less the proceeds of any reletting or attornment as set forth above. No act by or on behalf of City under this provision shall constitute a termination of this Lease unless City gives Tenant written notice of termination.

12.1.3. Tenant's Furniture, Fixtures and Equipment. City may, at its election, use Tenant's Furniture, Fixtures and Equipment without compensation and without liability for use or damage, or store such Furniture, Fixtures and Equipment for the account and at the cost of

Tenant. The election of one remedy for any one item shall not foreclose an election of any other remedy for another item or for the same item at a later time.

12.1.4. Waiver. Tenant waives any right of redemption or relief from forfeiture under any present or future statutes or case decisions to the same effect, if Tenant is evicted or City takes possession of the Property by reason of any default by Tenant hereunder.

12.1.5. Recovery of Rent. City shall be entitled at its election to each component of Rent or to any combination of components for any period after default and before termination plus interest at the rate provided in this Lease from the due date of each component. City shall use reasonable efforts to mitigate Tenant's liability under this provision.

12.2. Event of Default by City. If any default by City shall continue uncured after notice of default and the expiration of the cure period permitted by this Lease, Tenant shall have the right, at its option, in addition to any other remedy Tenant may have at law or in equity, without any further demand or notice, to terminate this Lease. Delays in delivery of water by Global Water shall not be deemed a default by City.

12.3. Litigation. In the event of litigation for breach of this Lease, the prevailing Party shall be awarded its reasonable attorneys' fees and costs.

### **13. Ownership of Improvements.**

Improvements made on the Property shall, so long as the Lease is in full force and effect, belong to Tenant. Upon the expiration or termination of this Lease for any reason, all Tenant Improvements and Furniture, Fixtures and Equipment necessary or convenient to sustain the uninterrupted operations of the Tenant Improvements shall at the sole and exclusive option of City become the property of City. Tenant shall have the right to remove personal property other than the Tenant Improvements and Furniture, Fixtures, and Equipment necessary or convenient to sustain the uninterrupted operations from the Property so long as such removal does not interfere with or damage the Tenant Improvements. Upon removal of such personal property, the Property shall at the sole and exclusive option of City (i) be returned to its original condition by Tenant at the sole cost and expense of Tenant, or (ii) be returned to City with the Tenant Improvements and Furniture, Fixtures and Equipment intact. The foregoing obligations shall survive the termination or expiration of this Lease.

### **14. Indemnity and Insurance.**

14.1. Disclaimer of Liability. City shall not at any time be liable for injury or damage occurring to any person or property from any cause whatsoever arising out of Tenant's use of the Property.

14.2. General Indemnification. Tenant, shall, at its sole cost and expense, indemnify, defend and hold harmless City and all associated, affiliated, allied and subsidiary entities of City, now existing or hereinafter created, and their respective officers, elected officials, boards, commissions, employees, agents, attorneys, and contractors (hereinafter referred to as "Indemnitees") for, from and against:

14.2.1. Any and all liabilities, obligations, damages, penalties, claims, liens, costs, charges, losses and expenses (including, without limitation, reasonable fees and expenses of attorneys, expert witnesses and consultants) (“Claims”), which may be imposed upon, incurred by or be asserted against the Indemnitees by reason of any act or omission of Tenant, its personnel, employees, agents, invitees, contractors, or subcontractors, resulting in personal injury, bodily injury, sickness, disease or death to any person or damage to, loss of or destruction of tangible or intangible property, libel, slander, invasion of privacy and unauthorized use of any trademark, trade name, copyright patent, service mark or any other right of any person, firm or corporation, which may arise out of the construction, installation, operation, maintenance, use or condition of the Property or Tenant’s failure to comply with any federal, state or local law, statute, ordinance or regulation. This obligation does not apply to the extent of any gross negligence or willful misconduct of any Indemnitee.

14.2.2. Any and all Claims which are imposed upon, incurred by or asserted against the Indemnitees by reason of any claim or lien arising out of work, labor, materials or supplies provided or supplied to Tenant, its contractors or subcontractors, for the installation, construction, operation, maintenance or use of the Property and, upon the written request of City, Tenant shall cause sum claim or lien covering City’s property to be discharged or bonded within thirty (30) days following such request.

14.2.3. Any and all Claims which may be imposed upon, incurred by or be asserted against the Indemnitees by reason of any financing or securities offering by Tenant or its affiliates for violations of the common law or any laws, statutes, or regulations of the State of Arizona or United States, including those of the Federal Securities and Exchange Commission, whether by Tenant or otherwise.

14.2.4. The indemnities set forth in this Section 14.2 shall survive the termination or expiration of this Lease.

14.3. Environmental Obligations and Liability.

14.3.1. Phase I Environmental Site Assessment. Tenant shall, at its sole cost, obtain a Phase I Environmental Site Assessment of the Property (“Phase I”) within thirty (30) days after the Effective Date and provide a copy of the Phase I to City. If the Phase I reveals any condition existing on the Property that would require a Phase II Environmental Site Assessment of the Property (“Phase II”), then Tenant may, at its sole cost and expense obtain a Phase II within ninety (90) days after the Effective Date and provide a copy of the Phase II to City. If Tenant objects to any matter in the Phase I or Phase II, Tenant may terminate this Lease by giving written notice to City within fifteen (15) days following Tenant’s receipt of the Phase I or Phase II, as applicable.

14.3.2. Environmental Laws. Tenant recognizes that assuring protection of public health, welfare and the environment from activities upon the Property during the Term of this Lease is an important consideration for City and during such Term the federal, state and local laws, rules, regulations and ordinances relating to pollution, protection of the environment, public health, safety or industrial hygiene (hereinafter referred to as the “Environmental Laws”) will

change. Tenant warrants that throughout the Term of this Lease, Tenant will operate its activities and business at the Property in compliance with all Environmental Laws.

14.3.3. Regulated Substances. Tenant further warrants, unless disclosed and agreed to by City, that no liquid, solid, semi-solid or gaseous substances (hereinafter referred to as “Regulated Substances”) which are, or during the Term of this Lease may become, subject to regulation under Environmental Laws will be used on the Property, except for commonly applied pool-related chemicals used in the operation of the Permitted Uses and other water features in compliance with Environmental Laws. Tenant shall not have on the Property any Regulated Substances, other than in compliance with Environmental Laws. Regulated Substances include, but are not limited to, any and all substances, materials or wastes regulated under the Resource Conservation and Recovery Act, 43 U.S.C. § 8909, et. seq.; the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9601, et. seq.; the Toxic Substances Control Act, 15 U.S.C. § 2601, et. seq.; the Arizona Hazardous Waste Management Act, A.R.S. § 49-921, et. seq.; the Arizona Underground Storage Tank Regulation Act, A.R.S. § 49-101, et. seq.; and the rules and regulations adopted and guidelines promulgated pursuant to the Environmental Laws.

14.3.4. Pollutants. In addition to the other requirements of this Section 14.3, Tenant shall not release, discharge, leak or emit, or permit to be released, discharged, leaked or emitted into the atmosphere, ground, soil, sewer system, surface water or groundwater any substance if such substance (as reasonably determined by City, or any governmental authority) does or may pollute or contaminate the same, or may adversely affect (1) the environment, (2) the health, welfare or safety of persons whether located on the Property or elsewhere, or (3) the condition, value, use or enjoyment of the Property or any other real or personal property. Tenant has or will timely obtain, maintain and comply with all provisions of all permits, licenses and other authorizations which are required under the Environmental Laws (hereinafter referred to as the “Permits”).

14.3.5. Required Notifications. Tenant shall immediately notify City, verbally and in writing, of any allegations by any governmental authority or other person or entity of any event of non-compliance with the Environmental Laws or Permits of this Section 14.3. Tenant shall also immediately notify City verbally and in writing, of any allegations by any governmental authority or other person or entity, of any events, conditions, circumstances, activities, practices, incidents, actions or plans which may interfere with or prevent continued compliance with Environmental Laws, Permits or the provisions of this Section 14.3, or which may give rise to any common law or legal liability, or otherwise form the basis of any claim, action, suit, proceeding, hearing or investigation, based on or related to the generation, manufacture, distribution, use, treatment, storage, disposal, transport, or handling, or the emission, discharge, release or threatened release into the environment, of any pollutant, contaminant or Regulated Substance.

14.3.6. City Inspection. City, or its authorized representative, agent or contractor, shall have the right, upon reasonable notice, to inspect the Property and to review and copy documents, records, and data maintained by Tenant relating to substances used and stored on the Property or disposed of, released or otherwise removed from the Property, in order to assure itself that Tenant is in compliance with the provisions of this Section 14.3.

14.3.7. Environmental Inspection. City shall have the right, at its expense, to perform periodic environmental inspections as City deems necessary using the services of a qualified and duly licensed environmental engineer selected by City. Said engineer shall conduct such sampling and testing of soils, water, substances and emissions as City deems necessary to assure itself that Tenant is in compliance with the provisions of this Section 14.3. In the event the results of the inspection indicate a need for further testing and/or remediation as a result of Tenant's use of the Property in order to comply with ADEQ or EPA remediation standards or guidelines, then Tenant hereby shall reimburse City for its reasonable inspection costs and to pay for such additional testing and remediation as will be required as a consequence of Tenant's use of the Property. Should remediation be required as a consequence of Tenant's use of Property, Tenant shall immediately undertake such remediation as is necessary to restore the condition of the Property and shall diligently pursue such work to completion. Tenant's failure to timely perform its obligations under this Section 14.3 shall be considered a material breach of this Lease, and Tenant's obligations under this Section 14.3 shall continue beyond the expiration or termination hereof. Nothing in this Section 14.3 shall constitute a waiver of any right of Tenant, including without limitation, the right to receive contribution from any third party responsible for contamination of any part of the Property.

14.3.8. Indemnification. To the fullest extent permitted by law, Tenant agrees to indemnify, defend and hold City and the Indemnitees harmless for, from and against all costs of legally required remediation of environmental contamination and from any claims, demands, actions, suits, proceedings, hearings, investigations, responsibility, liabilities, obligations, orders, injunctions, judgments, fines, penalties, liens, costs, charges, expenses, damages and losses of any nature whatsoever (including without limitation, any attorneys' and expert witness fees, investigation, clean up, removal, disposal, remedial, corrective, or mitigating action costs, fines and penalties related in any way to Tenant's use of the Property), arising out of or relating in any way to Tenant's present or future use of, or activities or operations on or at, the Property, or arising from or relating to any breach of the provisions of this Section 14.3, except that Tenant shall not be responsible for, and shall not be required to indemnify, defend, or hold City and the Indemnitees harmless for, from, or against Claims arising out of environmental conditions that existed before the Effective Date of this Lease. These indemnities shall survive the termination or expiration of this Lease.

14.4. Defense of Indemnitees. In the event any action or proceeding shall be brought against the Indemnitees by reason of any matter for which the Indemnitees are indemnified hereunder, Tenant shall, upon notice from any of the Indemnitees, at Tenant's sole cost and expense, resist and defend the same with legal counsel mutually selected by Tenant and City; provided however, that Tenant shall not admit liability in any such matter on behalf of the Indemnitees without the written consent of City and provided further that Indemnitees shall not admit liability for, not enter into any compromise or settlement of, any claim for which they are indemnified hereunder, without the prior written consent of Tenant.

14.5. Notice, Cooperation and Expenses. City shall give Tenant prompt notice of the making of any claim or the commencement of any action, suit or other proceeding covered by the provisions of this Section 14. Nothing herein shall be deemed to prevent City from cooperating with Tenant and participating in the defense of any litigation by City's own counsel. If Tenant requests City to assist it in such defense, then Tenant shall pay all reasonable expenses incurred

by City in response thereto, including defending itself with regard to any such actions, suits or proceedings. These expenses shall include all out-of-pocket expenses such as attorney fees and shall also include the costs of any services rendered by City's attorney, and the actual expenses of City's agents, employees of expert witnesses and disbursements and liabilities assumed by City in connection with such suits, actions or proceedings.

14.6. Insurance. The indemnification obligations under this Section 14 shall not in any way be affected by the absence in any case of covering insurance or by the failure or refusal of any insurance carrier to perform any obligation on its part to be performed under insurance policies affecting the Property.

14.7. Insurance. Tenant shall procure and maintain for the duration of this Lease, at Tenant's own cost and expense, insurance against claims for injuries to persons or damages to property which may arise from or in connection with this Lease by Tenant, its agents, subtenants, employees, contractors, licensees or invitees in accordance with the insurance requirements set forth in Exhibit G attached hereto. Every tenth (10th) year of the Term, City in its discretion may, upon advance written notice to Tenant at least ninety (90) days prior to the start of that year, make commercially reasonable modifications to the insurance requirements and issue an updated version of Exhibit G to Tenant.

14.8. General Insurance Provisions. All insurance carried by Tenant shall be affected under valid and enforceable policies issued by financially responsible insurers which meet the requirements for insurers which are subject to the service of legal process in the State of Arizona. All insurance obtained by Tenant shall be primary, noncontributory, not contingent upon and not in excess of any other insurance, and shall be carried in favor of and name as additional insureds both the City and Tenant. Certificates or other reasonably satisfactory evidence of existence and effectiveness of the initial policies or renewal policies, if any, as the case may be, required to be carried by Tenant shall be delivered to the City on or before execution of this Lease and thereafter not less than twenty (20) days prior to the expiration dates of the expiring policies. Tenant may carry any part of the insurance required to be maintained by Tenant under an umbrella excess liability policy meeting the insurance requirements of this Lease. All insurance policies required to be maintained by Tenant shall provide that they cannot be cancelled, nonrenewed, terminated, or materially reduced in coverage until at least twenty (20) days prior notice has been given to the City (ten (10) days in the case of nonpayment), to the effect that such insurance policy is to be terminated, not renewed, cancelled or materially reduced in coverage at a particular time.

14.9. Failure to Maintain Insurance. If Tenant fails or refuses to provide a copy of the renewal insurance policies, together with evidence of payment of premiums therefor as required above, or otherwise fails or refuses to procure or maintain insurance as required by this Lease, City shall have the right, at City's election in its sole and absolute discretion, and upon ten (10) days' notice to Tenant (two (2) business days' notice in the case of nonpayment), to procure and maintain such insurance. The premiums paid by City shall be due and payable by Tenant to the City on the first day of the month following the date on which the premiums were paid. City shall give prompt notice of the payment of such premiums, stating the amounts paid and the name of the insured(s).

14.10. City Disclaimer of Insurance for Tenant Improvements. The Parties hereto agree that the City shall not be liable as an insurer or co-insurer. City shall not provide insurance for any loss or damage whatsoever to the Tenant Improvements. Any general insurance coverage acquired or established by the City for loss or damage to improvements, buildings or other structures generally owned by the City throughout City shall not apply to the Tenant Improvements.

14.11. Disposition of Insurance Proceeds. Insurance proceeds shall be used, at Tenant's option, to reconstruct, repair or replace the damaged or destroyed property. If Tenant does not elect to reconstruct, repair or replace, insurance proceeds shall be paid to Tenant and Tenant shall use any or all of such proceeds as necessary to clear the Property of any damaged or destroyed property and cause the Property to be in a safe and secure condition.

14.12. Deductibles. All insurance policies may be written with deductibles, not to exceed \$5,000 unless approved in advance by City. Tenant agrees to indemnify and save harmless City and the Indemnitees for, from and against the payment of any deductible and from the payment of any premium on any insurance policy required to be finished by this Lease.

## **15. Unavoidable Delays.**

The schedules and time limits set forth in this Lease may be extended for Unavoidable Delays. "Unavoidable Delays" shall mean one or more of the following acts or events, to the extent that they substantially impair the ability of a Party to carry out its obligations under this Lease: acts of God, acts of the Federal or state government, failure of City to approve an application related to the Property that delays the development of the Permitted Uses or that would otherwise cause Tenant to be in default under this Lease, national, state, or local emergency, acts of war, riots, terroristic threats or terrorism, litigation concerning the validity and enforceability of this Lease or relating to transactions contemplated by this Lease (other than the effect of litigation instituted by Tenant, or a successor in interest or tenant of Tenant, against City), natural disasters, fires, floods, droughts, epidemics, quarantines, strikes, embargoes, and in usually severe and unanticipated weather or the delays of subcontractors or material due to such causes. In no event shall: (i) any Party's financial condition or inability to fund or obtain funding, financing or leasing constitute an Unavoidable Delay with respect any obligation of such Party; or (ii) any delay arising from a Party's default or other failure to perform under this Lease constitute an Unavoidable Delay with respect to such Party's obligations under this Lease.

## **16. Holding Over.**

Any holding over after the expiration of the Term hereof without the consent of City shall be construed to be a tenancy from month to month at two times the rental amount herein specified (prorated on a monthly basis) and shall otherwise be for the term and on the conditions herein specified, so far as applicable.

## **17. Acceptance of Property.**

By taking possession of the Property, Tenant accepts the Property in the condition existing as of the Effective Date. City makes no representation or warranty with respect to the condition of the Property and City shall not be liable for any latent or patent defect in the Property, or any

representation made prior to the Effective Date. Notwithstanding any provision of this Lease to the contrary, Tenant shall have no liability to City whatsoever with respect to, or as a direct or indirect result of, the presence, escape, seepage, leakage, spillage, discharge, emission, transportation, or release from the Property of any hazardous substances or materials located on, under or within the Property prior to or on the Effective Date.

## **18. Notices.**

All notices, requests, demands, and other communications hereunder shall be in writing and shall be deemed given if sent by email, personally delivered or mailed, certified mail, return receipt requested; to the following addresses:

If to City: City of Maricopa  
Attn: City Manager  
39700 W. Civic Center Plaza  
Maricopa, Arizona 85138  
Telephone: (520) 316-6811  
Email: Rick.Horst@maricopa-az.gov

With a copy to: City of Maricopa  
Attn: City Attorney  
39700 W. Civic Center Plaza  
Maricopa, Arizona 85138  
Telephone: (520) 426-3824  
Email: denis@fitzgibbonslaw.com

If to Tenant: PHX Surf, LLC  
Attn: Erin La Grassa, Manager  
940 N. Vale  
Mesa, Arizona 85201  
Telephone: 480-290-1591  
Email: [erin.lagrassa@gmail.com](mailto:erin.lagrassa@gmail.com)

With a copy to: Reese L. Anderson  
Pew & Lake, PLC  
1744 S. Val Vista, Suite 217  
Mesa, Arizona 85204  
Office: 480-461-4670  
Email: [reese.anderson@pewandlake.com](mailto:reese.anderson@pewandlake.com)

Any notice sent by email, shall also include a notice sent by at least one (1) other of the approved methods set forth above.

## **19. Assignment and Encumbrance.**

19.1. Restriction on Transfer. Tenant shall not, without the prior written consent of the City, assign this Lease, or any interest herein or sublet the Property or any part thereof, or permit the use or occupancy of the Property by any parties other than Tenant (any such assignment,



encumbrance, sublease, license, or the like shall sometimes be referred to as a “Transfer”); provided however that Tenant may assign this lease to an affiliated entity or a “District” as defined in A.R.S. § 48-6201(2), for purposes of operating the facility. For purposes of the foregoing sentence, an affiliated entity means an entity where there is common ownership between the principals of the entities; provided however, that a “Transfer” that includes the withdrawal or change, voluntary, involuntary or by operation of law, of fifty percent (50%) or more of the members, or transfer of fifty percent (50%) or more of membership interests, within a twelve (12)-month period, or the dissolution of the limited liability company without immediate reconstitution thereof, shall be prohibited. Any Transfer that requires City’s consent which occurs without City’s consent shall constitute a default by Tenant under this Lease, and in addition to all of City’s other remedies at law, in equity or under this Lease, such Transfer shall be voidable at City’s election. No Transfer shall release Tenant from Tenant’s obligations under this Lease or alter the primary liability of Tenant to pay the rent and to perform all other obligations to be performed by Tenant hereunder unless otherwise agreed in writing by City.

19.2. Permitted Transfer. Notwithstanding the foregoing, no consent of City is required for Tenant to effect a Transfer (by operation of law or otherwise) of this Lease or any of its rights hereunder to: (i) any person, corporation, partnership or other entity which acquires all or substantially all of the business or assets of Tenant or equity in Tenant; (ii) any person, corporation, partnership or other entity which controls, is controlled by or is under common control with Tenant; or (iii) any affiliate (within the meaning of such term as set forth in Rule 501 of Regulation D under the Federal Securities Act of 1933, as amended) of Tenant (each a “Permitted Transferee”). In no event shall a Permitted Transferee be a governmental entity.

19.3. Assignment to Lender or Financing. Tenant may not assign its rights under this Lease to any person providing financing for the construction and development of the Property or any person that provided permanent financing upon completion of construction and development of the Property (a “Lender”). Tenant shall not engage in any financing or other transaction creating any mortgage or deed of trust upon the Property, place or suffer to be placed upon the Property any lien or other encumbrance or suffer any levy or attachment to be made on Tenant’s interest in the Property. Any such mortgage or deed of trust, encumbrance, or lien shall be deemed to be a violation of this Lease, on the date of its execution or filing of record regardless of whether or when it is foreclosed or otherwise enforced.

19.4. Bankruptcy. If this Lease is terminated by reasons of bankruptcy, assignment for the benefit of creditors, insolvency or any similar proceedings or by operation of law, City may, in its sole and absolute discretion, upon the written request of a creditor, enter into a new lease (which shall be effective as of the date of termination of this Lease) with such creditor for the then remaining Term of this Lease on the same terms and conditions as are then contained in this Lease (a “New Lease”), provided that such creditor (i) makes its request for a New Lease within sixty (60) days after the bankruptcy is filed, (ii) promptly cures all then-existing monetary defaults under this Lease, and (iii) agrees to cure all then-existing non-monetary defaults within the applicable cure period, and thereafter diligently pursues such cure until completion. Any subsequent Transfer under the New Lease shall be subject to all of the requirements of Section 19 of this Lease. Concurrently with the execution and delivery of any New Lease, City shall assign to the tenant named therein all of its right, title and interest in and to moneys (including insurance proceeds and condemnation awards), if any, then held by or payable to City which Tenant would

have been entitled to receive but for the termination of this Lease. Upon the execution of any New Lease, the tenant named therein shall be entitled to any rent received by City under any sublease in effect during the period from the date of termination of this Lease to the date of execution of such New Lease. Effective upon the commencement of the term of any New Lease, all subleases shall be assigned and transferred to the tenant under the New Lease.

## **20. Successors and Assigns.**

Subject to Section 19, this Lease shall be binding upon and inure to the benefit of the parties, their respective successors, and assigns.

## **21. Non-Waiver.**

Failure of the City to insist on strict performance of any of the conditions, covenants, terms or provisions of this Lease or to exercise any of its rights hereunder shall not waive such rights, but City shall have the rights to enforce such rights at any time and take such action as might be lawful or authorized hereunder, either in law or equity. The receipt of any sum paid by Tenant to City after a breach of this Lease shall not be deemed a waiver of such breach unless expressly set forth in writing.

## **22. Taxes.**

22.1. Real and Personal Property. Tenant shall pay all real and personal property taxes (or payments in lieu of taxes) or excise taxes, if any, which become due and payable during the Term of this Lease. All such payments shall be made, and evidence of all such payments shall be provided to City, at least ten (10) days prior to the delinquency date of the payment. Tenant shall pay all taxes on its personal property on the Property. Tenant shall pay, before delinquency, any and all taxes levied or assessed and which become payable during the Term hereof upon all Tenant's leasehold improvements, Furniture, Fixtures and Equipment, and personal property located in the Property. As required under A.R.S. § 42-6206, Tenant is hereby notified of its potential tax liability under the Government Property Lease Excise Tax provisions of A.R.S. § 42-6201, et seq. Failure of Tenant to pay any tax is an event of default hereunder.

22.2. Rent and Other Taxes. Tenant shall pay to City, together with the installments of Base Rent, an amount equal to any state or local sales, rental, occupancy, excise or use taxes assessed or levied with respect to the amounts paid by Tenant to City hereunder, as well as all taxes assessed or imposed gross receipts or gross income from City's leasing the Property to Tenant, including, without limitation, transaction privilege taxes, education excise taxes, any tax now or hereafter imposed by the town, county or state in which the Property is located or any other governmental body and any taxes assessed or imposed in lieu of or in substitution of any of the foregoing taxes. Tenant shall also pay to City all taxes arising from constructive receipt of income by City as a result of this Lease, Tenant's improvement of the Property pursuant to this Lease, and any other form of benefit received by or imputed to City as a result of Tenant's use and occupancy of the Property pursuant to this Lease.

22.3. Changes to the Method of Taxation. If the methods of taxation in effect on the Effective Date of this Lease are altered so that in lieu of or as a substitute for any portion of the property taxes and special assessments now imposed on the Property there is imposed a tax upon

or against the rent payable by Tenant to City, Tenant shall pay those amounts in the same manner as provided for the payment of real and personal property taxes.

22.4. Tenant's Right to Contest. Tenant may seek a reduction in the assessed valuation (for tax purposes) of the Property provided the same is done in good faith by and at Tenant's sole cost and expense. Tenant may defer payment of any contested taxes or assessments; provided that (a) Tenant's deferral is in compliance with applicable law permitting such deferral; and (b) if requested by City, Tenant deposits with City such amount requested by City to cover the disputed amount plus interest and penalties that accrue thereon. City may pay the disputed amounts if City determines in its sole judgment that payment is necessary to protect City's property. Nothing herein shall preclude City from contesting taxes or assessments applicable to periods of time prior to or after the Term. Tenant shall be entitled to all refunds associated with Tenant's successful prosecution of any such proceeding; provided, such refunds relate to periods of time during the Term. All refunds related to periods of time other than during the Term shall belong to City. If required by applicable law, City shall join in any proceeding referred to in this Section 22.4; provided, however, Tenant shall indemnify, defend and hold City harmless from, from and against any costs and expenses, including without limitation, reasonable attorneys' fees, associated with such proceedings.

## **23. Miscellaneous.**

23.1. City and Tenant represent that each, respectively, has full right, power, and authority to execute this Lease, and the execution, delivery, and consummation of this Lease by Tenant have been duly authorized by all necessary company, corporate or partnership action.

23.2. This Lease, including the recitals and Exhibits attached hereto, constitutes the entire agreement and understanding of the parties and supersedes, in total, all offers, negotiations, representations and other agreements of any kind. There are no representations or understandings of any kind including, but not limited to, all the terms and provisions of this Lease, not set forth herein. Any modification of or amendment to this Lease must be in writing and executed by both parties.

23.3. This Lease shall be construed and interpreted under and governed and enforced according to the laws of the State of Arizona, without giving effect to the principles of conflicts of law. The parties agree that should any court action be commenced relating to this Agreement, that the Pinal County Superior Court shall be the appropriate and exclusive venue, therefore. The parties expressly waive any and all provisions of law providing for a change of venue to any other state or federal court.

23.4. If any term of this Lease is found to be void or invalid, such invalidity shall not affect the remaining terms of this Lease, which shall continue in full force and effect.

23.5. Except as otherwise expressly provided herein, whenever the consent of approval of City or Tenant is required under the terms of this Lease, such approval shall not be unreasonably withheld.

23.6. Except as otherwise provided herein, the parties agree there are no third-party beneficiaries to this Lease.

23.7. City will have the right to approve any lighting plans provided by Tenant.

23.8. City will have the right to approve of any noise decibels levels created by music, machinery, loud speaker announcements, and video displays provided by Tenant.

23.9. Time is of the essence of this Lease and every provision thereof.

23.10. This Lease may be subject to cancellation pursuant to A.R.S. § 38-511.

## **24. Tenant's Water Obligations.**

24.1. Tenant to Secure All Water. Tenant, at its sole cost and expense, shall secure renewable water supplies to meet 100% of the water demand of the Property for the entire Term of the Lease, including any production and transportation losses. Tenant agrees City shall have no obligation whatsoever to supply water to the Property during the entire Term of the Lease.

24.2. Payment of Water Costs. Tenant shall during the entire Term of this Lease be responsible for paying for all water delivered to the Property.

24.3. Water Quality Maintenance. Following delivery of water to the Property, Tenant shall during the entire Term of this Lease maintain the quality of such water in accordance with all applicable federal, state and local laws, including without limitation laws pertaining to minimum standards for bodily contact, as such may exist from time to time.

24.4. Disposal of Water. Tenant shall during the entire Term of this Lease be responsible at its sole cost and expense for treatment and disposal of all water delivered to the Property. Tenant acknowledges and agrees that City will not provide, and shall not be responsible for providing, any sewer or other service for disposal of water delivered to the Property.

24.5. Reporting Requirements. Tenant shall at its sole cost during the entire Term of the Lease, including the Operations Phase and each Extended Term, timely submit to ADWR and all other applicable governmental bodies and agencies, all reports, correspondence and other submittals required to comply with Tenant's obligations pursuant to applicable rules, regulations, laws and judicial and agency orders, permits and directives, as well as this Section 24. Tenant shall submit to City concurrently with Tenant's delivery thereof to ADWR as well as to any other applicable governmental body or agency, complete copies of all reports, correspondence and other submittals relating to the use of water at the Property.

24.6. Compliance with Laws. Tenant shall during the entire Term of this Lease, including the Construction Phase, Operations Phase and each Extended Term comply with all applicable federal, state and local laws and regulations relating to the use of water at the Property, including without limitation all applicable conservation requirements.

## **25. City's Water Obligations.**

25.1. Reasonable Cooperation. If necessary, City shall cooperate reasonably with Tenant in Tenant's approval processes relating to Tenant's use of water acquired by Tenant at the Property for recreational purposes.

25.2. Emergency Operations. In the event that Tenant is required to drain any of the water features located within the Property as a result of an emergency or governmental mandate, City shall cooperate reasonably with Tenant in attempting to secure for use one or more locations for the disposal of such water at Tenant's sole cost and expense.

## **26. Condemnation.**

If the whole or any material part of the Property shall be taken, or repurposed by City, or appropriated under any right of eminent domain or under any other legal right whereby the taking authority is obligated to compensate City therefore, then Tenant may terminate and cancel this Lease by providing written notice of termination to City without owing any liability to City other than through the date of termination, to be effective as of the date on which the condemning authority takes physical possession of the Property. City agrees to give Tenant written notice after City's notice or receipt of any notice of intended or actual taking of appropriation, providing to Tenant a copy of any notice received by City and all information provided to City by the condemning authority as it affects the Property. If this Lease shall be terminated and canceled as a result of any taking or appropriation, any paid Base Rent for the last month of Tenant's occupancy shall be prorated and City shall refund to Tenant any non-applicable sums paid in advance. At the time of such taking or appropriation, as between City and Tenant, Tenant shall be entitled to receive all condemnation awards and other similar awards paid with respect to the condemnation or other similar governmental action with respect to the leasehold interest in the Property and the value of the Tenant Improvements thereon even though the Tenant Improvements may revert to City upon termination of this Lease. Tenant's right to receive compensation for loss of business, moving or similar expenses, or damages for its fixtures and its personal property shall not be affected in any manner whatsoever by this provision of this Lease. In addition, City shall not agree to any award affecting the Property without the prior written consent of Tenant, which shall not be unreasonably withheld or delayed.

## **27. Dispute Resolution.**

27.1. Disputes. The Parties recognize that from time to time, there may be disputes involving financial issues or interpretation of this Lease. The Parties desire to effect a timely and efficient resolution of such disputes and, adopt the procedures set forth in this Section 27, provided however, this Section 27 shall not apply to events of default.

27.2. Arbitration. In the event a dispute arises under this Agreement, City and Tenant agree that there shall be a thirty (30) day moratorium on litigation during which time the City and Tenant agree to attempt to settle the dispute by non-binding mediation before commencement of litigation. The mediation shall be held under the Commercial Mediation Rules of the American Arbitration Association ("AAA") but shall not be under the administration of the AAA unless agreed to by the City and Tenant in writing, in which case all administrative fees shall be divided evenly between the City and Tenant. The matter in dispute shall be submitted to an arbitrator mutually selected by City and Tenant. If the Parties cannot agree upon the selection of an arbitrator within ten (10) days, then within five (5) days thereafter, the City and Tenant shall request that the Presiding Judge of the Superior Court in and for the County of Pinal, State of Arizona, appoint the arbitrator. The arbitrator selected shall have at least ten (10) years of experience in mediating or arbitrating disputes relating to commercial property. The cost of any such arbitration shall be

divided equally between the City and Tenant. The results of the arbitration shall be nonbinding with either City or Tenant free to initiate litigation upon the conclusion of the latter of the mediation or of the thirty (30) day moratorium on litigation. The arbitration shall be completed in one (1) day (or less) and shall be confidential, private, and otherwise governed by the provisions of A.R.S. § 12-2238, to the extent allowed by the Arizona Open Meetings Law, A.R.S. § 38-431 et. seq.

27.3. Obligations. The Parties shall continue to perform all of their respective obligations under this Lease Without interruption or delay during resolution of any disputes under this Section 27.

## **28. Net Lease.**

This Lease is intended to be a “net lease”, and Tenant shall pay to City, absolutely net throughout the Lease Term, the Base Rent, and other sums arising hereunder, free of any charges, assessments, impositions or deductions of any kind and without abatement, deduction or set-off whatsoever. Under no circumstances or conditions, whether now existing or hereafter arising, or whether beyond the present contemplation of the parties, shall City be expected or required to make any payment of any kind whatsoever or be under any other obligation or liability hereunder. Tenant shall pay all costs, expenses and charges of every kind and nature relating to the Property, which may arise or become due or payable prior to, during or after (but attributable to a period falling prior to or within) the Lease Term. Except as otherwise specifically provided in this Lease, Tenant’s obligation to pay Base Rent, and other sums arising hereunder accruing during the Lease Term hereof shall not terminate prior to the date definitely fixed for the expiration to the Lease Term. Except as specifically set forth herein, the obligations of Tenant hereunder shall not be affected by reason of any damage to or destruction of the Property or any part thereof, any taking of the Property or any part thereof or interest therein by condemnation or otherwise, any prohibition, limitation, restriction or prevention of or interference with Tenant’s use, occupancy or enjoyment of the Property or any part thereof by any action of any governmental authority. The parties intend that the obligations of Tenant under this Lease shall be separate and independent covenants and agreements and shall continue unaffected unless such obligations have been modified or terminated pursuant to an express provision of this Lease or by mutual written agreement of City and Tenant.

[Signatures of the Parties Appear on the Following Page]

**IN WITNESS WHEREOF**, the parties have entered into this Lease effective as of the Effective Date.

**CITY**

CITY OF MARICOPA,  
a municipal corporation

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

Its Ricky Horst, City Manager

**Attest:**

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

Vanessa Bueras, CMC  
City Clerk

**Approved as to form:**

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

Denis M. Fitzgibbons  
City Attorney

**TENANT:**

PHX Surf, LLC,  
an Arizona limited liability company

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

Name: \_\_\_\_\_

Its: \_\_\_\_\_

**EXHIBIT A**  
**(LEGAL DESCRIPTION OF PROPERTY)**

[to be attached]



**EXHIBIT B**  
**(AREA MAP)**

[to be attached]

**EXHIBIT C**  
**(PERMITTED USES)**

- Beer, wine and alcohol license
- Boardwalk Pathway
- Corporate Events and private parties
- Film, televisions specials, commercials are permissible
- Food and Beverage delivery service within the property
- Food and beverage service to all cabanas or locations within the fenced in area of the facility
- Indoor Party Rooms
- Kids Play Area
- Kite boarding
- Learn to swim classes
- Lessons, clinics and children camps
- Lifeguard basic, intermediate and advanced training courses
- Live entertainment, amplified music
- On-water yoga
- Offices
- Outdoor Cabanas Areas (rentable) in Turf/Beach/Lagoon areas
- Paddle Boarding
- Parking Spaces
- Maintenance Facility
- Merchandise Sales
- Rental of Storage Lockers and Equipment
- Restaurant
- Restrooms
- Sand Beach
- Sand volleyball
- Signage and sponsorship branding allowed throughout Property in accordance with City standards
- Stadium lighting
- Stand up Paddle boarding
- Surfing and related activities
- Swimming and Wading
- Swimming areas
- Swimming pool, Lazy River
- Wave Pools
- Video and multi-media devices for transmission of content
- Water conservation education
- Web based Food and Beverage (including alcohol) order system within the property
- Wi-Fi access
- Wind surfing
- Other such ancillary and related uses to a similar facility or project
- And other such uses as may be mutually agreed in writing by Tenant and the City.

\* - Excluded from 10% Discount for City Residents

**EXHIBIT D**  
**(TENANT IMPROVEMENTS)**

- Fully functioning surf water features
- Beach area with cabanas
- Landscaping around perimeter of facility to meet City code
- Concessions stand
- Office
- Restrooms
- Parking Lot

And any other improvements in the final City-approved version of the site plan or mutually agreed to in writing by the parties.

**EXHIBIT E**  
**(DEVELOPMENT SCHEDULE & KEY DATE SUMMARY)**

[to be attached]

**EXHIBIT F**  
**(AMORTIZATION SCHEDULE)**

[to be attached]

**EXHIBIT G**  
**(INSURANCE REQUIREMENTS)**

The insurance requirements herein are the minimum requirements for this Lease and in no way limit the indemnity covenants contained in this Lease. City in no way warrants that the minimum limits contained herein are sufficient to protect Tenant from liabilities that might arise out of this Lease for Tenant, its agents, representatives, employees or contractors and Tenant is free to purchase such additional insurance as may be determined necessary.

A. Minimum scope and limits of insurance.

Tenant shall provide coverage at least as broad and with limits of liability not less than those stated below.

1 Commercial General Liability – Occurrence Form (during period prior to Operations Phase Commencement Date) Policy shall include:

Bodily injury, property damage, hostile fire and contractual liability coverage, each occurrence	\$1,000,000.00
Bodily Injury and Property Damage Each occurrence	\$1,000,000.00
Personal and Advertising Injury Each occurrence	\$1,000,000.00
Products/Completed Operations	\$2,000,000.00
Products/Completed Operations Aggregate	
General Aggregate	\$2,000,000.00

a. The policy shall be endorsed to include the following additional insured language: “The Town or City shall be named as an additional insured with respect to liability arising out of the use and/or occupancy of the property subject to this Lease.”

b. The policy shall include: (i) coverage for hazards of explosion, collapse and underground property damage, (ii) products/completed operations coverage per state statutes plus one year (i.e., 9 years), (iii) additional insured endorsements CG 20 10 04 13 and CG 20 37 04 13 or equivalent, and (iv) a “per project” aggregate.

2. Commercial General Liability – Occurrence Form (during entire Operations Phase) Policy shall include:

Bodily injury, property damage, hostile fire and contractual liability coverage, Each occurrence	\$20,000,000.00
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Bodily Injury and Property Damage, Each occurrence	\$20,000,000.00
Personal and Advertising Injury, Each occurrence	\$20,000,000.00
Products/Completed Operations Products/Completed Operations, Aggregate	\$20,000,000.00
General Aggregate	\$20,000,000.00
Liquor Liability	\$1,000,000 each occurrence / \$2,000,000 annual aggregate

a. The policy shall be endorsed to include the following additional insured language: **“The Town of City shall be named as an additional insured with respect to liability arising out of the use and/or occupancy of the property subject to this Lease.”**

b. The policy shall include: (i) coverage for hazards of explosion, collapse and underground property damage, (ii) products/completed operations coverage per state statutes plus one year (i.e., 9 years), (iii) additional insured endorsements CG 20 10 04 13 and CG 20 37 04 13 or equivalent, and (iv) a “per project” aggregate.

### 3. **Pollution Legal Liability**

Per Occurrence	\$1,000,000
Annual Aggregate	\$2,000,000

a. The policy shall be endorsed to include the following additional insured language: **“The Town of City shall be named as an additional insured with respect to liability arising out of the use and/or occupancy of the property subject to this Lease.”**

b. The policy shall be written on an “occurrence” basis with no sunset clause or if written on a “claims-made” basis, it shall be maintained for a period of not less than 8 years with the retroactive date to be prior to or held constant with the date of this Lease.

c. The policy shall include coverage for: (i) on and off-site cleanup of sudden and gradual pollution conditions arising from the Property, (ii) third-party claims for on and off-site bodily injury including sickness, disease, mental anguish or shock sustained by any person, including death and medical monitoring costs, (iii) third-party claims for property damage including physical injury to or destruction of tangible property including the resulting loss of use thereof, cleanup costs and the loss of use of tangible property that has not been physically injured or destroyed and diminution in value, (iv) claims resulting in bodily injury, property damage or cleanup costs associated with a pollution condition from transported cargo if the Lease requires the transportation of any hazardous materials, and (v) defense including costs, charges and expenses incurred in the investigation, adjustment or defense of claims for such compensation damages.

4. **All Risk Property Insurance**

Policy shall include business interruption and extra expense coverage, and shall cover the full replacement cost of all property, equipment and improvements installed or placed in the Property by Tenant.

5. **Worker's Compensation** with no less than the minimum limits required by law.

6. **Employer's Liability Insurance** with minimum limits of not less than: \$1,000,000 per accident, Bodily Injury by Accident, \$1,000,000 each employee, Bodily Injury by Disease, \$1,000,000 policy limit, Bodily Injury by Disease.

7. If Tenant utilizes automobiles on the Property or in connection with its operations under the Lease, **Business Automobile Liability Insurance** with a limit of not less than \$1,000,000.00 combined single limit for each accident, with such insurance covering liability arising out of any automobile, including owned, hired and non-owned automobiles. Coverage shall include coverage for "bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" arising out of the collision, upset or overturn of an auto as a result of the maintenance or use of a covered "auto." The policy shall include the following endorsements: (i) CA 99 48 Pollution Liability - Broadened Coverage for Covered Autos, and (ii) MCS-90 (Motor Carrier Act).

8. **Business Income Insurance** or rental interruption insurance, as requested by City, without a provision for co-insurance (on the rental interruption insurance policy only), in an amount equal to 100% of the Base Rent for a period of not less than twelve consecutive calendar months.

**B. Other insurance requirements**

The policies are to contain, or be endorsed to contain, the following provisions:

1. **Commercial General Liability:**

a. City, its officers, officials, agents and employees are to be named as additional insureds with respect to liability arising out of: the use and/or occupancy of the Property and activities performed by or on behalf of the Tenant; products and completed operations of the Tenant.

b. The Commercial General Liability Insurance shall include contractual liability coverage.

c. The Tenant's insurance coverage shall be primary insurance with respect to City, its officers, officials, agents and employees. Any insurance or self-insurance maintained by City, its officers, officials or employees shall be in excess of the Tenant's insurance and shall not contribute to it.

d. The Tenant's insurance shall apply separately to each insured against whom claim is made or suit is brought, except with respect to the limits of the insurer's liability, officers,



officials, agents and employees for losses arising from Tenant's operations, occupancy and use of the Property and/or other actions covered by Tenant's insurance.

**2. Waiver of Subrogation:**

The insurer shall agree to waive all rights of subrogation against City, its officers, officials, agents, employees and volunteers for any and all losses arising from Tenant's operations, occupancy and use of the Property and/or other activities or actions covered by Tenant's insurance.

**3. Builders Risk Insurance (Course of Construction) and All Risk Property Insurance:**

a. This insurance shall be written on an all risk form and shall include coverage for flood and earthquake.

b. All rights of subrogation are hereby waived against City, its officers, officials, agents and employees.

c. The policies shall contain a standard loss payee clause naming City as loss payee.

d. Builders' Risk Insurance must provide coverage from the time any covered property becomes the Contractor's responsibility, and continuing without interruption during construction, renovation, or installation, including any time during which the covered property is being transported to the construction installation site, and while on the construction or installation site awaiting installation.

**C. Notice of Cancellation.**

For each insurance policy required by the insurance provisions of this Lease, Tenant must provide to City, within two (2) business days of receipt, a notice if a policy is suspended, voided or cancelled for any reason. Such notice shall be sent to City. Such notice shall be by certified mail, return receipt requested.

**D. Acceptability of Insurers.**

Insurance is to be placed with insurers duly licensed or approved unlicensed companies in the State of Arizona and with a "Best's" rating of not less than A:VII. City in no way warrants that the above required minimum insurer rating is sufficient to protect Tenant from potential insurer insolvency.

**E. Verification of Coverage.**

Tenant shall furnish City with Certificates of Insurance (ACORD form or equivalent approved by City) and with original endorsements effecting coverage as required by this Agreement and authorized by that insurer to bind coverage on its behalf.

All certificates and endorsements are to be received and approved by City before Tenant's entry upon the Property. Each insurance policy required by this Lease must be in effect at or prior to Tenant's entry upon the Property and remain in effect for the duration of the Lease.

All certificates of insurance required by this Lease shall be sent directly to City and shall include City's lease/contract number, Tenant's name and description of the Property shall be provided on the Certificates of Insurance. City reserves the right to require complete certified copies of all insurance policies required by this Lease, at any time.

**F. Approval.**

Any modification or variation from the insurance requirements in this Lease shall be approved by City's Attorney, whose decision shall be final. Such action will not require a formal Lease amendment, but may be made by administrative action.