

## MIDTOWN DEVELOPMENT

### EXCLUSIVE NEGOTIATION AGREEMENT

This Exclusive Negotiation Agreement is entered into this 4th day of May, 2020 by and between the City of Santa Fe, a municipal corporation (“**City**”), and KDC Cienda SF Investments One LP, a limited partnership, organized under the laws of the State of Texas (“**KDC/Cienda**”).

#### I. RECITALS

WHEREAS, the City owns certain real property that was formerly the College of Santa Fe, subsequently operated as the Santa Fe University of Art and Design, comprised of approximately 65 acres, more or less, depicted on **Exhibit A**, and is now referred to as the Midtown Property;

WHEREAS, the City desires that the Midtown Property be reinvigorated and redeveloped as a vibrant, mixed-use city center;

WHEREAS, in August 2018, the Governing Body of the City adopted the Midtown Guidelines, which set out the priorities and the preferred and non-preferred uses of the Midtown Property;

WHEREAS, using the Midtown Guidelines, the City issued a Request for Expression of Interest, Bid No. 20/05/P on July 31, 2019 (“**RFEI**”), for a master developer and proposal for the development and use of the Midtown Property;

WHEREAS, KDC /Cienda responded to the RFEI;

WHEREAS, KDC/Cienda represented to the City in its Response dated October 31, 2019 to the RFEI, its Response dated February 14, 2020 to the City’s Request for Additional Information, its Interview Presentation dated February 20, 2020 and its Responses dated February 28, 2020 and March 3, 2020 to the City’s Requests for Clarifications, (collectively, “**Submission**”

**Package”)** that KDC/Cienda has the background of knowledge and experience and the ability to successfully develop the Midtown Property;

WHEREAS, KDC/Cienda seeks to develop the Midtown Property consistent with the Submission Package;

WHEREAS, an Evaluation Committee, established by the City, has recommended based upon its review and assessment of all responses to the RFEI, including the Submission Package, that the Governing Body select KDC/Cienda as the Master Developer of the Midtown Property; and

WHEREAS, the City and KDC/Cienda desire to enter into an agreement for the exclusive negotiation of mutually acceptable terms, provisions and conditions for the transfer of the Midtown Property from the City to a master developer for development that will be the subject of a Disposition and Development Agreement (“**DDA**”);

WHEREAS, after the Evaluation Committee recommended KDC/Cienda as the Master Developer of the Midtown Property, the COVID-19 Pandemic and resulting economic downfall have changed the world dramatically;

WHEREAS, the Parties recognize that, under these unprecedented circumstances, they will need to be creative and adaptable to accomplish the goals described in this ENA, including executing a DDA; and

NOW THEREFORE, in consideration of the foregoing Recitals, which shall be part of this Agreement, and the mutual promises hereinafter set forth, the sufficiency of which are hereby acknowledged, the City and KDC/Cienda agree as follows:

## **II. DEFINITIONS**

“**Parties**” mean the City of Santa Fe (“**City**” or “**Owner**”) and KDC/Cienda, (“**KDC/Cienda**,” “**Master Developer**” or “**Contractor**”), each a party (“**Party**”) to this Agreement.

“**Agreement**” or “**ENA**” means this Exclusive Negotiation Agreement.

“**COVID-19 Restrictions**” means any restrictions on conducting business in the City imposed by the City, the State of New Mexico, or Federal government as the result of the COVID-19 pandemic, which delay the development schedule.

“**Development Framework**” means the Development Program, the Scheduling & Phasing Plan, the Development Budget and Financing Plan, the Due Diligence Reports, and the Legal Entitlement Applications, as provided in Article 4.

“**Disposition and Development Agreement**” or “**DDA**” means the agreement that the City and KDC/Cienda may enter into pursuant to the ENA to provide for the disposition by the City and the development by Master Developer of the Midtown Property in accordance with the terms thereof.

“**Project Site**” means Midtown Santa Fe, 1600 St. Michaels Drive, Santa Fe, NM 87505.

“**Project**” means the redevelopment of the Midtown Property.

“**Scope of Work**,” as it relates to this Agreement, means the Development Framework, including all reasonable or necessary related activities

“**Third Party Expenses**” means all third party expenses incurred by KDC/Cienda to obtain third party studies and reports with respect to the Project including, without limitation, all due diligence and feasibility studies and tests, and all land planning and other consulting reports obtained by KDC/Cienda with respect to the Project.

## ARTICLE 1.

### PURPOSE

1.1 Statement of Purpose. The purpose of this Agreement is to provide for the preparation of the Development Framework for the Project, the determination of the feasibility of the Project, and the negotiation of the terms and conditions upon which the Parties may enter into a DDA for the Project Site (“**Purpose**”).

## ARTICLE 2.

### TERM

2.1 Effective Date. This Agreement shall be effective as of May 4, 2020 (“**Effective Date**”).

2.2 Initial Term. This Agreement shall commence on the Effective Date and continue for twelve (12) months plus the number of days delay due to COVID-19 Restrictions, unless sooner terminated as provided herein (“**Initial Term**”). The Initial Term represents the length of time that the Parties reasonably believe will be required to complete the Purpose of this Agreement.

2.3 Extended Term. In the event that the Parties have not finally executed and delivered a DDA during the Initial Term, then either party may extend the Initial Term of this Agreement for four (4) additional months (“**Extended Term**”). (Together, the Initial Term and any Extended Term are referred to as “**Term**”). A party shall exercise the right to extend the Initial Term by giving written notice thereof to other Party on or before the last day of the Initial Term. The City Manager, acting on behalf of the City, shall have the right to extend the Initial Term.

## ARTICLE 3.

### CITY RESPONSIBILITIES

During the Term of this Agreement:

3.1 Exclusive Negotiations. The City shall negotiate exclusively with KDC/Cienda regarding the Project and any DDA relating to the Project, and shall not solicit, market to, or negotiate with any other person, firm or corporation regarding the Project or the Midtown Property, including the development, sale or lease thereof. With regard to existing leases on the property, other than the Santa Fe Art Institute, the terms expire or may be terminated within the next twelve (12) months, and the City will consult with KDC/Cienda before extending or otherwise modifying the lease terms.

3.2 Good Faith. The City shall act diligently, cooperate reasonably, and negotiate with KDC/Cienda in good faith to carry out the Purpose of this Agreement. In that regard, KDC/Cienda understands and agrees that by entering into this Agreement, the City is making no commitment to approve the Development Framework or enter into a DDA with KDC/Cienda. KDC/Cienda further understands and agrees that the City retains the right to exercise full discretion with respect to any and all acts, proceedings and decisions relating to the Midtown Property, the Development Framework, the Project and a DDA.

3.3 Access to Information. Within a reasonable time after request (taking into account the nature of the information requested), the City shall provide KDC/Cienda with access to all information in the City's possession relevant to the Scope of Work under this Agreement, including maps, plats, leases, and other information relating to the Project Site and preparation of the Development Framework; provided however, that the City shall have no obligation to provide any information to KDC/Cienda that is privileged, confidential, or otherwise not subject to public disclosure unless the parties agree to share such information by entering a non-disclosure agreement.

3.4 Access to Project Site. The City shall provide KDC/Cienda with reasonable access to the Project Site for all purposes within the Scope of Work, as provided in Section 5.6, below.

3.5 City's Project Team. The City shall designate a project team to effect the Purpose of this Agreement ("**City Project Team**"). The City Project Team shall include:

Name: Richard Brown  
Title: Director, Department of Economic Development  
Role: Executive Decision-Maker

Name: Erin K. McSherry  
Title: City Attorney  
Role: Legal Counsel

City Consultant:  
Name: Daniel Hernandez  
Firm: Proyecto  
Role: Project Manager

The City Project Team shall coordinate with KDC/Cienda as to all matters subject to this Agreement, including, specifically, Articles 4 and 5, below. City hereby agrees that the Executive Decision-Maker shall be the single point of contact for Master Developer with respect to the Project and shall have direct responsibility to manage City's day-to-day activities under this Agreement and to coordinate the Project with Master Developer. The Executive Decision Maker may delegate his or her authority to a delagee, provided he or she provides notice to the Master Developer in writing.

3.6 General Cooperation. City agrees to reasonably cooperate with Master Developer in performance of the Scope of Work described below.

**ARTICLE 4.**  
**SCOPE OF WORK**

During the Term of this Agreement, Master Developer shall undertake and perform, at its sole cost and expense, the activities described in this Article 4 (“**Scope of Work**”), and shall prepare the Development Framework for the Project, including the following deliverables which shall be submitted to the City during the Initial Term (“**Deliverables**”):

4.1 Development Program. Master Developer shall prepare a written development program for the Project Site (“**Development Program**”). The Development Program shall be consistent with the proposals described in the Submission Package in all material respects except as may otherwise be agreed to by the Parties in writing. Master Developer shall act diligently, cooperate reasonably, and negotiate in good faith with the City to refine the Development Program to meet mutually agreed upon community development, public policy, and development objectives that will achieve the goals of the City’s Midtown Guidelines and KDC/Cienda’s investment objectives.

4.2 Scheduling and Phasing Plan. The Development Program shall include as a separate part thereof, a scheduling and phasing plan for the Project (“**Scheduling and Phasing Plan**”). The Scheduling and Phasing Plan shall describe each phase of the Development Program, including (a) the specific development activities to be undertaken in each phase of the Project with respect to each differing tract of land and structure within the Project Site, and (b) the projected date of commencement and completion of each such activity.

4.3 Phase I and Initial Development. The Scheduling and Phasing Plan shall include as a separate part thereof, a detailed plan for the implementation of Phase I of the Development Program, which may include development projects expected to commence contemporaneously

with certain predevelopment activities or prior to the execution of a final DDA (“**Initial Development Projects**”).

4.4 Development Budget and Financing Plan. Master Developer shall prepare a detailed development budget and financing plan for the implementation of the Development Program (“**Development Budget and Financing Plan**”). The Development Budget and Financing Plan shall be based upon the preliminary budget and financing assumptions for the Project described in the Submission Package, updated to reflect existing economic conditions. The Development Budget and Financing Plan shall (a) project the total cost of the Development Program, including a breakdown of the cost of each phase, specifying the projected cost of each component of each phase, including but not limited to the costs of infrastructure, re-purposing existing structures, any new construction and open space; (b) identify the sources and amounts of capital required to finance the Development Program, including each phase thereof, and specifying the public and private sources of capital and the amounts of equity and debt financing; and (c) estimate the fair market value of all land within the Project Site, considering the proposed use in the Development Program of the differing tracts and all other relevant factors. Master Developer shall act diligently, cooperate reasonably and negotiate in good faith with the City to refine the Development Budget and Financing Plan to establish a mutually agreeable price, terms and conditions for the purchase or lease of the Project Site from the City for the Project. In negotiating the terms of sale or lease of the Project Site, the Parties will try in good faith to facilitate the financing and implementation of the Project, meet the City’s operating budget parameters with respect to limiting, reducing, and eliminating operating costs, and achieve investment goals of KDC/Cienda. The Parties understand that the Development Budget and Financing Plan will be



updated as frequently as every three months, to reflect evolving values and costs of the Development Program and the scope of the Development Program.

4.5 Phase I and Initial Development Financing Plan. The Development Budget and Financing Plan shall include as a separate part thereof, a detailed Financing Plan for Phase I and any proposed Initial Development Projects.

4.6 Due Diligence Reports. Master Developer shall perform all customary, reasonable or necessary professional development due diligence activities relating to the feasibility of the Development Program, including the preparation and submission to the City of reports of the following conditions at the Project Site to the extent deemed necessary by Master Developer: soils and civil engineering, environmental, infrastructure, structural engineering, architectural, mechanical, electrical, and plumbing (“**Due Diligence Reports**”).

4.7 Legal Entitlements. Master Developer shall prepare and file on behalf of the City all applications required to secure all legal entitlements necessary to implement the Development Program, including any amendments to the City’s General Plan, any changes to the Zoning of the Midtown Property, and any approval of a Master Plan for the Project Site. All such applications shall meet the criteria for approval under applicable laws and regulations. Master Developer shall coordinate with the City in preparing and filing such applications, including complying with all requirements relating to the submission of documents, public engagement, the presentation of evidence, and public hearings. Master Developer shall obtain a final administrative decision on all such applications. City shall reasonably assist Master Developer in its efforts to obtain legal entitlements necessary to implement the Development Program.

## ARTICLE 5.

### CARRYING OUT THE ENA

5.1 Good Faith Deposit. Within seven (7) days after the Effective Date of the ENA, KDC/Cienda shall wire transfer to the City in the amount of \$25,000.00 satisfying the one-time fee required by the RFEI (“**Good Faith Deposit**”), as one tenth of one percent of the first phase estimated development costs. Two thirds of the Good Faith Deposit shall be non-refundable and may be used by the City to defray the cost of City staff, outside legal and consultant fees, and other expenses associated with the Purpose of this Agreement. The Good Faith Deposit shall be credited toward the price payable to the City by Master Developer under any DDA entered into by the Parties. **Exhibit B** describes the calculation of the Good Faith Deposit.

5.2 Development Framework Schedule. The Parties shall establish a schedule for the commencement and completion of the Development Framework, including all Deliverables (“**Development Framework Schedule**”). The Development Framework Schedule shall set milestones by which each activity that is part of each component of the Development Framework, as set forth in Sections 4.1 to 4.7 of Article 4, above, shall be completed. The Development Framework Schedule shall be made part of and incorporated by reference into this Agreement as **Exhibit C**. If, in advance of failing to meet a milestone, KDC/Cienda notifies the City in writing and seeks to negotiate in good faith an amendment to the Development Framework Schedule pursuant to 5.4.3, then KDC/Cienda shall not be in default under this Agreement for a failure to meet any milestone.

5.3 Development Framework Team. KDC/Cienda shall designate a team to prepare the Development Framework (“**Development Framework Team**”). The Development Framework Team shall include Master Developer’s project manager (“**Project Manager**”) and a

senior executive decision-maker from KDC/Cienda (“**Executive Decision-Maker**”), both of whom shall coordinate with their designated counterparts on the City Project Team. Master Developer’s Project Manager shall have direct responsibility to manage its day-to-day activities under the ENA and to coordinate performance of the Development Framework Schedule with the City. Master Developer’s Project Manager shall report to KDC/Cienda’s Executive Decision-Maker, who shall direct and control Master Developer’s performance of this Agreement. The Development Framework Team, including the Project Manager and the Executive Decision-Maker, shall be the individuals identified in the Submission Package. Upon designation, a roster identifying each member of the Development Framework Team and describing their responsibility with respect to preparation of the Development Framework, shall be submitted to the City for review and approval, which shall not unreasonably be withheld (“**Development Framework Team Roster**”). The Development Framework Team Roster shall be made part of and incorporated by reference into this Agreement as **Exhibit D**.

5.3.1 Regular Progress Reports. Master Developer’s Project Manager shall submit a written progress report to the City’s Project Manager and the Parties’ Executive Decision-Makers no less than once every thirty (30) days, summarizing the activities completed related to the project during the prior thirty (30) days (“**Progress Report**”), the receipts of which the City shall acknowledge in writing.

5.4 Management of the Development Framework.

5.4.1 Weekly Conferences. Master Developer’s Project Manager and the City’s Project Manager and, as necessary, their respective team members, shall confer by telephone or meet in-person, at least weekly to coordinate performance of the Development Framework Schedule.

5.4.2 Delays and Difficulties. Both Parties shall promptly report any delays in completing any milestone and any difficulties associated with satisfactory performance of any related activity to the other Party. If after such coordination, the delay or difficulty is not resolved, it shall be reported to the Parties' Executive Decision-Makers, who shall confer and attempt to mutually agree upon a resolution; provided that KDC/Cienda's Executive Decision Maker shall determine all actions to be taken. Both Parties shall document in writing all such delays, problems, resolutions and actions taken in the next regular Progress Report or Progress Report acknowledgment, as applicable.

5.5 Approvals not Advice. Master Developer understands and agrees that approval by the City of actions taken by Master Developer in connection with preparing the Development Framework shall not constitute any advice or recommendation as to the matter approved, and the City shall have no liability to Master Developer based upon or proximately caused by any such approval. Master Developer further understands and agrees that any such approval, including any review or comments by the City, or third-parties engaged by City, shall not relieve Master Developer of the sole responsibility for developing, performing and managing all activities within the Development Framework.

5.6 Right of Entry. During the Term of this Agreement, the City grants Master Developer, including its employees, agents, representatives, consultants and contractors, the right to enter the Project Site solely for the Purpose of this Agreement ("**Right of Entry**"). The Right of Entry shall be exercised only in accordance with the Access License Agreement, which shall be made part of and incorporated by reference into this Agreement as **Exhibit E**. Prior to exercising the Right of Entry, Master Developer shall provide the City with evidence, in the form of certificates of insurance and copies of endorsements, documenting that each consultant and

contractor hired by Master Developer who enters the Project Site shall have in effect reasonable public liability insurance, as provided in Section 5.7 below. Notwithstanding anything to the contrary in this Agreement, including this Section 5.6, Master Developer shall not conduct any third party testing on Project Site without giving prior written notice to the City's Project Manager or the Project Manager's designee, of (a) the specific activity to be undertaken (including, with respect to any invasive testing, a written plan for such testing, the name of the firm to perform such activity, their qualifications, and evidence of required insurance), and (b) the identity of the contractor to conduct the activity and Master Developer's approval thereof.

5.7 Insurance. Master Developer shall, at its own cost and expense, obtain and maintain the insurance coverages described in **Exhibits F (“Insurance Requirements”)** and **Exhibit G (“Additional Insureds”)**, which are attached to this Agreement, made part hereof and incorporated by reference herein.

5.8 Negotiation of DDA. During the Term of this Agreement, the Parties shall negotiate the proposed terms and conditions of any DDA to be submitted to the Governing Body of the City for its consideration. The Parties intend that any Initial Development Project(s) shall be the subject of a separate DDA, preceding a final DDA. The final DDA will set forth all of the terms, provisions and conditions for the disposition of the Project Site and development of the Project. The Parties intend that the Development Program, the Scheduling and Phasing Plan, and the Development Budget and Financing Plan shall be exhibits to, made part of, and be incorporated by reference in the final DDA. In negotiating a DDA, the Parties expect to address matters that may not be covered by the Development Framework.

5.9 End of Negotiations. The Parties shall each determine whether the Project is feasible, conclude all negotiations, and if agreed upon, execute and deliver any DDA by the end

of the Term of this Agreement.

## **ARTICLE 6.**

### **TERMINATION OF ENA**

6.1 Failure to Pay Deposit. If Master Developer fails to timely pay the Good Faith Deposit to the City in accordance with Section 5.1 above, this Agreement shall automatically terminate without further action by either Party.

6.2 Execution of DDA. If a DDA is executed by the Parties relating to all or part of the Project Site during the Initial Term or any Extended Term, then this Agreement shall terminate upon execution of said DDA with respect to the portion of the Project Site subject to the DDA.

6.3 Discretionary Termination by a Party. If, after six (6) months from the effective date of this Agreement, either Party concludes in its sole discretion, that (a) the Project is not feasible, or (b) that the negotiations are unlikely to result in the execution of mutually agreeable DDA, then such Party may terminate this Agreement by delivering written notice thereof to the other Party. The Parties shall work in good faith to find solutions and strategies that avoid a termination pursuant to this clause.

6.4 Expiration of Term. Unless sooner terminated as provided in this Article 6, this Agreement shall terminate upon expiration of the Term hereof without further action by either Party.

6.5 Termination for Default. Prior to expiration of the Term of the ENA, the City, in addition to the exercise of any other rights or remedies it may have, may terminate this Agreement upon the occurrence of a material default by Master Developer, and Master Developer's failure to cure such default within thirty (30) days after notice thereof from the City. Default shall be evidenced by Master Developer's failure to timely or satisfactorily perform its material obligations under this Agreement, including, specifically, Articles 4 and 5, above.

6.6 Force Majeure. The Parties enter this Agreement during a declared Public Health Emergency in the State of New Mexico and in places throughout the world, which already is impacting the manner in which they do business. Therefore, they recognize that the duty to negotiate in good faith and communicate regarding obstacles to performance is paramount. Should the current emergency or other emergency or disaster, beyond the reasonable control of either of the parties, cause either party to be unable to perform, the relevant Party shall alert the other as soon as possible and shall mitigate the damages to the other Party, including the consideration of amendments to this Agreement to allow performance. If amending the Agreement to address the inability to perform is not possible, the affected Party may terminate this Agreement without further obligations.

## **ARTICLE 7.**

### **GENERAL TERMS**

7.1 Limitation on Effect of Agreement. This Agreement shall not obligate the City or KDC/Cienda to enter into a DDA for the disposition or development of the Project Site. KDC/Cienda understands and agrees that any proposed DDA resulting from the negotiations between the Parties pursuant to this Agreement shall become effective only if and after such DDA

has been considered and approved by the Governing Body of the City, acting in its sole and absolute discretion, and executed and delivered by both City and Master Developer.

7.2 Distinction from Regulatory Authority of City. KDC/Cienda understands and agrees that this Agreement does not indicate and does not imply that the City, acting as a regulatory or permitting authority, has hereby granted, or is obligated to grant, any approval or permit that is required by law for the disposition of the Project Site or the development of the Project as contemplated by this Agreement.

7.3 Survival of Terms. All provisions of this Agreement which by their nature should survive the termination or expiration of this Agreement shall so survive, including but not limited to, Section 5.1, Section 5.7, Section 6.5, and this Article 7 in its entirety.

7.4 Limitations on Liability. In any action arising out of, based on, or relating to this Agreement, including but not limited to any action for breach of the ENA, the sole and exclusive remedy of KDC/Cienda shall be the termination of the ENA. In no event shall KDC/Cienda be entitled to the recovery of any damages for any costs or expenses it incurs, any loss from any business opportunity it forgoes, or any amounts it expects to gain, including without limitation any future or potential profits, by reason of this Agreement. In any such action, neither party shall be entitled to recover any consequential damages, treble, or punitive damages. In any dispute between the Parties arising out of this Agreement, each party shall bear its own costs and attorneys' fees.

7.5 Waiver of Lis Pendens. It is expressly understood and agreed by the Parties that no *lis pendens* shall be filed by any Party, including any person, firm or corporation contracting with a Party with respect to this Agreement, including any act, omission or dispute arising from it.

7.6 Exclusive Venue. In the event that an action is filed by either Party arising out of, based on, or in any way relating to this Agreement, the Parties agree that such action shall be filed



and the case tried exclusively in the District Court for the First Judicial District, County of Santa Fe, State of New Mexico.

7.7 Documents and Records.

A. All documents and records provided to or made available to the City under this Agreement shall become the property of and owned by the City without any further action by either Party. This provision is intended to protect the City's interest in retaining and using documents regarding the state of the Midtown Property and its infrastructure, including third party reports regarding land use conditions and options; it does not apply to trade-secret records created by, or unique to, KDC/Cienda and its partners. If KDC/Cienda provides such records including trade secrets to the City, KDC/Cienda shall clearly mark them "confidential".

B. The City is a public body subject to the New Mexico Inspection of Public Records Act ("IPRA"). The IPRA generally provides that written documents retained by the City are subject to disclosure upon the request of any third-party, except as otherwise provided in the IPRA.

C. If KDC/Cienda disagrees with a City assessment that a record must be produced pursuant to IPRA, KDC/Cienda shall be responsible, at its sole cost and expense, to take any action required by law to limit or prohibit the disclosure under the IPRA of any documents and records provided to the City under this Agreement.

7.8 No Assignment. The City is entering into this Agreement based upon the Submission Package of KDC/Cienda, including the representations therein with respect to the knowledge, experience and track record of each of them in the successful completion of similar development projects. The City understands that named principals of KDC and Cienda identified in the Submission Package will be personally involved the performance of this Agreement,

including as members of Master Developer's Development Framework Team. Further, KDC/Cienda understands that but for the direct involvement of KDC and Cienda as described in the Submission Package, the City would not enter into this Agreement. The Parties therefore agree that KDC/Cienda shall not sell, assign or transfer any of its rights or delegate any of its duties or obligations under this Agreement to any person, firm or entity, directly or indirectly, including by a change in the ownership, control or management of KDC or Cienda without the prior express written consent of the City which the City may withhold in its sole and absolute discretion.

7.9 Indemnification. KDC/Cienda shall indemnify, hold harmless, or insure the City, including its officers, employees, and agents, against claims, liability, damages, losses and costs arising from any personal injury or damage to personal property, including attorney fees, to the extent that any such claim, liability, damages, losses, or costs arise out of, or are proximately caused by any act or omission of KDC/Cienda, its officers, employees, agents, representatives, consultants or contractors in furtherance of this Agreement. Nothing in this Agreement shall be construed as an indemnification by the City for any loss, damages, injury or death arising out of, or proximately caused, in whole or part, by the City, its officials, employees, attorneys, agents, representatives, consultants or contractors. Nothing herein shall obligate or be construed to obligate the City to provide any indemnity, insurance or other protection for or on behalf of KDC/Cienda or any third party.

7.10 Relationship of the Parties. Nothing in this Agreement, or in the use of the term "Public-Private Partnership" by any person in connection with or in reference to this Agreement, the Project Site or the Project shall make, or be deemed or construed to make, the Parties joint venturers, partners, agents, a joint enterprise, employer and employee, or lender and borrower. KDC/Cienda shall have no authority to hire any person as an employee or agent of the City for

any purpose. Neither KDC/Cienda nor any of its affiliates, members, directors, officers, employees, agents, representatives, consultants or contractors shall represent or hold themselves out as an employee, agent, or person or entity acting for or on behalf of the City.

7.11 Real Estate Commission. The Parties, the City and KDC/Cienda, each represent that it has not engaged any broker, agent, or finder in connection with this Agreement, including any transaction described herein, and that no commission is due or owing to any person, firm or entity by reason of this Agreement or any subsequent DDA between the Parties. This Agreement is made and entered into solely for the benefit of the City and KDC/Cienda, and no other person shall have any right of action under this Agreement.

7.12 Notices. Any and all notices or other communications required or permitted to be given under this Agreement shall be in writing and either (a) personally delivered, in which case notice shall be deemed given upon receipt; (b) sent by electronic mail, in which case notice shall be deemed given upon the transmission of such email, if transmitted on a business day before 5:00 p.m. Mountain Standard Time (MST), otherwise on the next business day, and provided that no error message is received by the sender, and provided further that upon request by the sender of an email, the recipient shall reply confirming receipt of the same; (c) sent via any nationally recognized overnight courier service with provision for proof of delivery, in which case notice shall be deemed given on the next business day after the sender deposits the same with such courier service; or (d) sent via the United States Mail, postage prepaid, certified mail, return receipt requested, in which case notice shall be deemed given on the date of delivery as shown on the return receipt, or the date of the addressee's refusal to accept delivery as indicated by the United States Postal Service. In any case, all such notices or other communication shall be addressed to the following addressees:

KDC/Cienda

KDC Cienda SF Investments  
One LP 8115 Preston Road, Suite 700  
Dallas, Texas 75225  
Email: [scott.ozymy@kdc.com](mailto:scott.ozymy@kdc.com)  
Attention: Scott Ozymy

Copy to  
Cienda  
Cienda Partners  
4514 Travis, Suite 326  
Dallas, Texas 75205  
Email: [Pwise@cienda.com](mailto:Pwise@cienda.com)  
Attention: Philip Wise

Copy to  
Jackson Walker LLP  
2323 Ross Avenue, Suite 600  
Dallas, Texas 75201  
Email: [gcdunlap@jw.com](mailto:gcdunlap@jw.com)  
Attention: George C. Dunlap, Jr.

City of Santa Fe

Jarel LaPan Hill  
City Manager  
200 Lincoln Avenue  
Santa Fe, New Mexico 87504-0909  
Email: [jlhill@santafenm.gov](mailto:jlhill@santafenm.gov)

Erin K. McSherry  
City Attorney  
200 Lincoln Avenue  
Santa Fe, New Mexico 87504-0909  
Email: [ekmcsberry@santafenm.gov](mailto:ekmcsberry@santafenm.gov)

Richard Brown  
Economic Development Director  
200 Lincoln Avenue  
Santa Fe, New Mexico 87504-0909  
Email: [rdbrown@santafenm.gov](mailto:rdbrown@santafenm.gov)

Any Party may change the address for notice from time to time by giving notice to the other Party in writing in the manner provided above; provided, however, that notice of any such change shall be effective only upon actual receipt by the other Party.

7.13 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of New Mexico, without reference to, or application of any of its choice of law provisions.

7.14 Entire Agreement. This Agreement and the exhibits and documents incorporated by reference, including but not limited to KDC/Cienda's Submission Package, constitute the entire agreement of the Parties regarding the subject matters of this Agreement. No prior oral or written

understandings or agreements of the Parties shall be of any force or effect. This Agreement shall be modified or amended only in writing, duly executed by the Parties.

7.15 Counterparts. This Agreement may be executed in counterparts, each of which shall be deemed an original, but all of which together shall constitute one and the same agreement. This Agreement may be executed and delivered by the exchange of electronic facsimile copies, .pdf, or other electronic image files of counterparts of the signature page, which shall be considered the equivalent of an original signature page for all purposes.

7.16 Conflict of Interest. KDC/Cienda represents and warrants that it presently has no interest and, during the term of this Agreement, shall not acquire any interest, direct or indirect, that conflicts in any manner or degree with the performance or services required under this Agreement. Recusal from an existing role to avoid a potential conflict is consistent with this representation and warranty. For example, KDC/Cienda has disclosed that it has a team member on the City's Planning Commission who would recuse himself when matters related to this Agreement are submitted for review. In addition, members of the KDC/Cienda team are in business in other areas of Santa Fe and those ongoing activities are anticipated to further, rather than conflict with, performance required under this Agreement. Should a conflict arise, KDC/Cienda will immediately notify the City to determine a resolution.

7.16.1 KDC/Cienda further represents and warrants that it has complied with, and, during the term of this Agreement, will continue to comply with, and that this Agreement complies with all applicable provisions of the Governmental Conduct Act, NMSA 1978, § 10-16-1 through 10-16-18.

7.16.2 KDC/Cienda's representations and warranties in this Section are material representations of fact upon which the City shall have relied when this Agreement is

executed by the Parties. KDC/Cienda shall provide immediate written notice to the City if, at any time during the Term of this Agreement, it learns that any representation and warranty in this Section was erroneous in any material respect on the Effective Date or becomes erroneous in any material respect by reason of changed circumstances. If it is later determined that any representation and warranty of KDC/Cienda herein was erroneous in any material respect on the Effective Date, or subsequently becomes erroneous in any material respect by reason of changed circumstances, the City, in addition to other rights and remedies it may have and notwithstanding anything to the contrary in this Agreement, may immediately terminate the ENA.

7.16.3 All terms defined in the Governmental Conduct Act shall have the same meaning in this Section.

7.17 Non-Discrimination. KDC/Cienda shall not discriminate in any way against any person on the basis of age, sex, race, color, religion, sexual orientation, disability, ethnicity or national origin in the performance of, or in any activity relating to, this Agreement.

7.18 Authorization to Execute. Each individual signing this Agreement represents that he or she is duly authorized to execute and deliver this Agreement on behalf of the Party named herein, and that to the knowledge of such person this Agreement is binding upon such Party in accordance with its terms.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the Effective Date.

KDC/CIENDA:  
KDC CIENDA SF INVESTMENTS ONE LP,  
a Texas limited partnership  
KDC Cienda SF Investments One GP LLC, a Texas limited liability company its general partner  
SIGNED:

  
Scott Ozymy (May 4, 2020)  
\_\_\_\_\_  
SCOTT OZYMY  
VICE PRESIDENT

May 4, 2020  
\_\_\_\_\_  
DATE

CITY:

CITY OF SANTA FE, a municipal corporation  
SIGNED:

\_\_\_\_\_  
ALAN WEBBER  
MAYOR

\_\_\_\_\_  
DATE

ATTEST:

\_\_\_\_\_  
YOLANDA Y. VIGIL  
CITY CLERK

\_\_\_\_\_  
DATE

APPROVED AS TO FORM:

  
\_\_\_\_\_  
ERIN K. MCSHERRY  
CITY ATTORNEY

May 4, 2020  
\_\_\_\_\_  
DATE

APPROVED AS TO FINANCES:

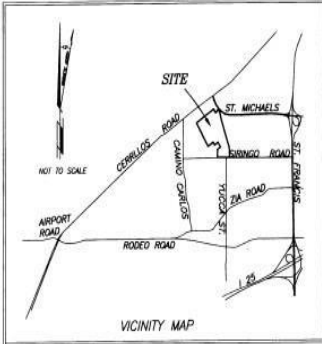
\_\_\_\_\_  
MARY T. MCCOY  
FINANCE DIRECTOR

\_\_\_\_\_  
DATE

# EXHIBIT A

## THE MIDTOWN PROPERTY PROJECT SITE

707.050



**LAND DESCRIPTION OF THE PERIMETER OF THE COLLEGE OF SANTA FE**

All Tracts of land lying within the Perimeter of the College of Santa Fe west Tract E, and Tract F, projected Section 34, T.17N, R.9E, N.M.P.M., Santa Fe County, New Mexico. Said Perimeter being more particularly described as follows:

Beginning at the most westerly corner of said Perimeter from whence a Brass Cop Surveyed Copra of Engineers US&H Co Corner Year 1922.

Bearing N37°17'11" W 885.80 feet.

Thence N57°41'28" E 1478.26 feet.

Thence N27°18'37" W 10.08 feet.

Thence N27°41'27" E 91.54 feet.

Thence S37°20'20" E 263.03 feet.

Thence 48.50 feet along a curve to the left with a radius of 25.00 feet and chord of S87°31'31" E 41.24 feet.

Thence N27°24'19" E 106.87 feet.

Thence N42°30'57" E 137.90 feet.

Thence N20°33'42" W 2.51 feet.

Thence 7.85 feet along a curve to the right with a radius of 10.00 feet and chord of N27°36'18" E 7.65 feet.

Thence N44°44'57" E 4.70 feet.

Thence 136.31 feet along a curve to the left with a radius of 1507.40 feet and chord of S47°35'48" E 139.26 feet.

Thence S12°34'38" E 620.10 feet.

Thence S18°23'31" E 1175.00 feet.

Thence S27°02'19" E 542.30 feet.

Thence S27°46'19" E 620.14 feet.

Thence S89°43'14" W 941.98 feet.

Thence N07°12'19" E 326.41 feet.

Thence N07°54'30" E 152.00 feet.

Thence N58°42'18" E 270.73 feet.

Thence N27°47'14" W 348.25 feet.

Thence S37°37'35" W 305.70 feet.

Thence N31°44'51" W 202.80 feet.

Thence S27°37'57" W 468.53 feet.

Thence N37°21'29" W 888.72 feet.

Thence N07°47'59" E 21.00 feet.

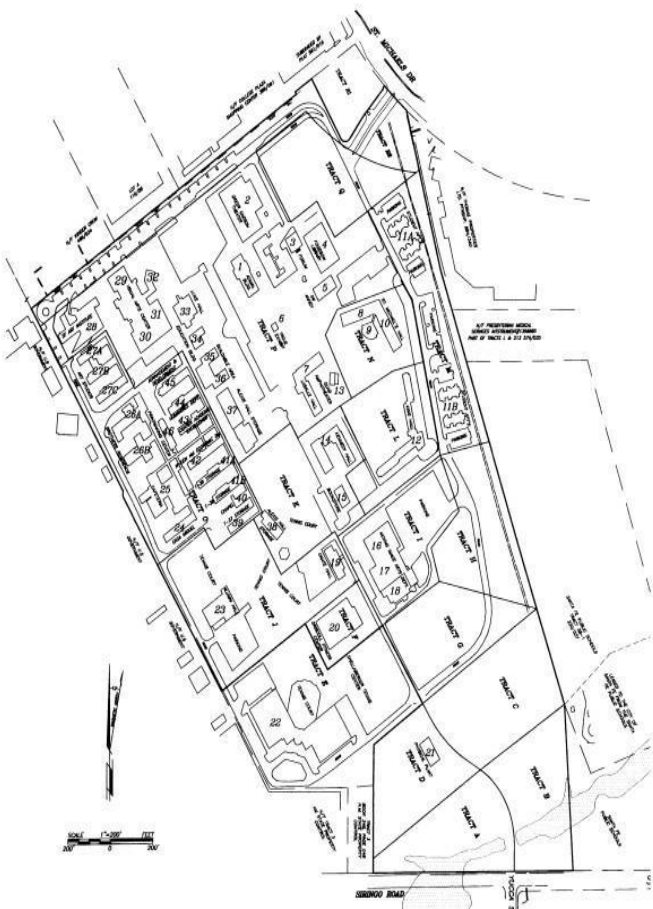
Thence N37°17'11" W 888.11 feet to the point of beginning, containing 91.38 Acres more or less, all as shown on hereon.

Including:

All of Tracts A, B, C, D, F, G, H, J, K, L, M, N and O as shown on Plat of Survey entitled "PLAT PREPARED FOR COLLEGE OF SANTA FE LOT LINE ADJUSTMENT OF EXISTING LOTS OF RECORDED MINOR COLLEGE OF SANTA FE PROPERTY PROJECTED SECTION 34, T.17N, R.9E, N.M.P.M. CITY AND COUNTY OF SANTA FE, filed for record as Document Number 1451276, appearing in Plat Book 633 of pages 46-47, records of Santa Fe County, NM.

AND All of Tract R as shown on Plat of Survey entitled "Division Plat Prepared for College of Santa Fe Tract R," filed for record as Document Number 1588772, appearing in Book 382 of page 6, records of Santa Fe County New Mexico.

AND All of Tract P and Q as shown on Plat of Survey entitled "Tract P Prepared for College of Santa Fe Lot Line Adjustment for Existing Tracts P, Q and R," filed for record as Document Number 1511115, appearing in Plat Book 672 of page 33, records of Santa Fe County, NM.



**SURVEYORS NOTE:**

AS TO THE TITLE MATTERS SHOWN HEREON EDWARD M. TRULLIO AND DAWSON SURVEYS INC. HAVE RELIED SOLELY ON THE TITLE REPORT AND LAND DESCRIPTION EATS PREPARED BY CHICAGO TITLE INSURANCE COMPANY COMMENCED AS 0988443, EFFECTIVE DATE OF SEPTEMBER 1, 2008. DAWSON SURVEYS INC. AND EDWARD M. TRULLIO MAKE NO STATEMENT TO THE ACCURACY OR THE COMPLETENESS OF THE SUBJECT REPORT.

WARRANTY DEED UNITED STATES OF AMERICA TO COLLEGE OF CHRISTIAN BROTHERS RECORDED 8L.46, Pg.437. DECLARATION OF TITLE PERFECTION RECORDED 8L.200, PAGES RELEASE OF CASHMENT RECORDED 8L.338, Pg.230. REMOVAL OF RIGHT TO NATIONAL EMERGENCY RECORDED 8L.365, Pg.235.

TRUSTS AND AGREEMENT BETWEEN COLLEGE OF CHRISTIAN BROTHERS AND ANDREW CROW RECORDED 8L.471, Pg.344.

TRUSTS AND PROVISIONS OF LEASE BETWEEN COLLEGE OF CHRISTIAN BROTHERS AND THE LANDHOLDING RECORDED 8L.685, Pg.347.

GRANT OF EASEMENT FROM THE COLLEGE OF SANTA FE TO THE BOARD OF EDUCATION OF THE CITY OF SANTA FE, RECORDED JUNE 25, 1981 IN 8L. 733, Pg.508.

AFFIRMATION AGREEMENT BY AND BETWEEN THE COLLEGE OF SANTA FE AND THE SANTA FE ART INSTITUTE, RECORDED MARCH 20, 2000 AS INST. #1558291.

MEMORANDUM OF LEASE COLLEGE OF SANTA FE AS LESSOR AND SANTA FE ART INSTITUTE AS LESSEE, RECORDED FEBRUARY 26, 2009 AS INST. #1553879.

GRANT OF EASEMENT BY AND BETWEEN THE COLLEGE OF SANTA FE AND NEW MEXICO BANK AND TRUST, RECORDED JUNE 12, 2008 AS INST. #1566667.

EASEMENT OR RIGHT OF WAY ACCESS TO PROPERTY, THE COLLEGE OF SANTA FE (DONOR) GRANTS TO AND CONVEYS TO FIRST COMMUNITY BANK (CONVEYOR) A NON-EXCLUSIVE RIGHT OF WAY, RECORDED SEPT. 21, 2007 AS INST.#1500440. LOCATION OF EASEMENT OR RIGHT OF WAY ACCESS TO PROPERTY AND GRANT OF REPLACEMENT EASEMENT BY AND BETWEEN THE COLLEGE OF SANTA FE AND FIRST COMMUNITY BANK, RECORDED AUG. 17, 2009 AS INST. #1511618.

**FLOOD ZONES:**

UNLESS OTHERWISE SHOWN THIS PROPERTY LIES WITHIN ZONE "X" AREAS DETERMINED TO BE OUTSIDE THE 0.2% ANNUAL CHANCE FLOODPLAIN.

ZONE "X" OTHER FLOOD AREAS AREAS OF 0.2% ANNUAL CHANCE FLOOD AREAS OF 1% ANNUAL CHANCE FLOOD WITH AVERAGE DEPTH OF LESS THAN 1 FOOT OF WITH DRAINAGE AREAS LESS THAN 1 SQUARE MILE, AND AREAS PROCEEDED WITHIN 1% ANNUAL CHANCE FLOOD.

ZONE "X" SPECIAL FLOOD HAZARD AREAS (SPECIAL SUBJECT TO INUNDATION BY THE 1% ANNUAL CHANCE FLOOD, BASE FLOOD ELEVATING DETERMINED).

**LEGEND:**

AREAS ARE NEW MEXICO STATE PLANE GRID, CENTRAL ZONE. DISTANCES ARE REFERRED TO GRID AND 6800 FEET ANGL. GRID TO GRID SCALE FACTOR = 9999859.

★ DENOTES FOUND SURVEY MONUMENT AS INDICATED

◆ DENOTES RIGHT P214, 2322, T.86N, OF 12517 AS SHOWN TO BE SET UPON RECORDING

◆ DENOTES WITNESS SIGNATURE

◆ DENOTES CALCULATED POINT

◆ DENOTES BOUNDARY OF LANDS DEALT WITH BY THIS PLAT INFORMATION OUTSIDE OF THIS BOUNDARY IS BACKGROUND INFORMATION ONLY NOT VERIFIED FOR ACCURACY AND IS NOT PART OF THIS PLAT

**SURVEYORS CERTIFICATE:**

I AM A NEW MEXICO REGISTERED PROFESSIONAL SURVEYOR AND HEREBY CERTIFY THAT I CONDUCTED AND AM RESPONSIBLE FOR THIS SURVEY COMPLETED ON THE 09 DAY OF AUG. 2008. THIS SURVEY IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF AND THAT THIS SURVEY AND PLAT MEET THE MINIMUM STANDARDS FOR SURVEYS IN NEW MEXICO.

EDWARD M. TRULLIO 11/14/2009 DATE

**"TITLE AND INDEXING INFORMATION FOR COUNTY CLERK"**

**BOUNDARY SURVEY PLAT**  
PREPARED FOR THE  
**COLLEGE OF SANTA FE**  
WITHIN  
COLLEGE OF SANTA FE PROPERTY  
PROJECTED SECTION 34, T.17N, R.9E, N.M.P.M.  
CITY AND COUNTY OF SANTA FE NEW MEXICO.

DAWSON SURVEYS INC.  
PROFESSIONAL LAND SURVEYORS  
2524 CANTO ENTRADA  
SANTA FE, N.M. 87507  
PL#088810-C-SF DATE 9/14/09

**PUBLIC NOTICE**

THIS SURVEY IS BASED ON THESE RECORDED DOCUMENTS NOTED HEREON. CITY OF SANTA FE STAFF MUST APPROVE ALL DOCUMENTS SUBMITTED WITH AN APPLICATION FOR A BUILDING PERMIT AND MAY REQUIRE SUBMITTAL OF ADDITIONAL DOCUMENTATION TO PROTECT LEGAL LOT OF RECORD.

**NOTE:**

THIS PLAT SUBJECT TO RESTRICTIONS, COVENANTS AND EASEMENTS OF RECORD AS SHOWN ON PLATS REFERENCED HEREON.

**REFERENCE DOCUMENTS:**

1. DIVISION PLAT PREPARED FOR THE COLLEGE OF SANTA FE, BY DAWSON SURVEYS INC., RECORDED MAY 19, 2008 IN PLAT BOOK 662, PAGE 616.
2. REPLAT PREPARED FOR COLLEGE OF SANTA FE, BY DAWSON SURVEYS INC., RECORDED JAN. 2, 2008 IN PLAT BOOK 672, PAGE 33.
3. REPLAT PREPARED FOR COLLEGE OF SANTA FE, BY DAWSON SURVEYS INC., RECORDED SEPT. 19, 2008 IN PLAT BOOK 633, PAGE 46-47.

COUNTY OF SANTA FE  
STATE OF NEW MEXICO

I hereby certify that this instrument was filed for record on the 14 day of September, A.D. 2008 at 1:41 o'clock p.m. and was duly recorded as Instrument No. 157272 of the records of County

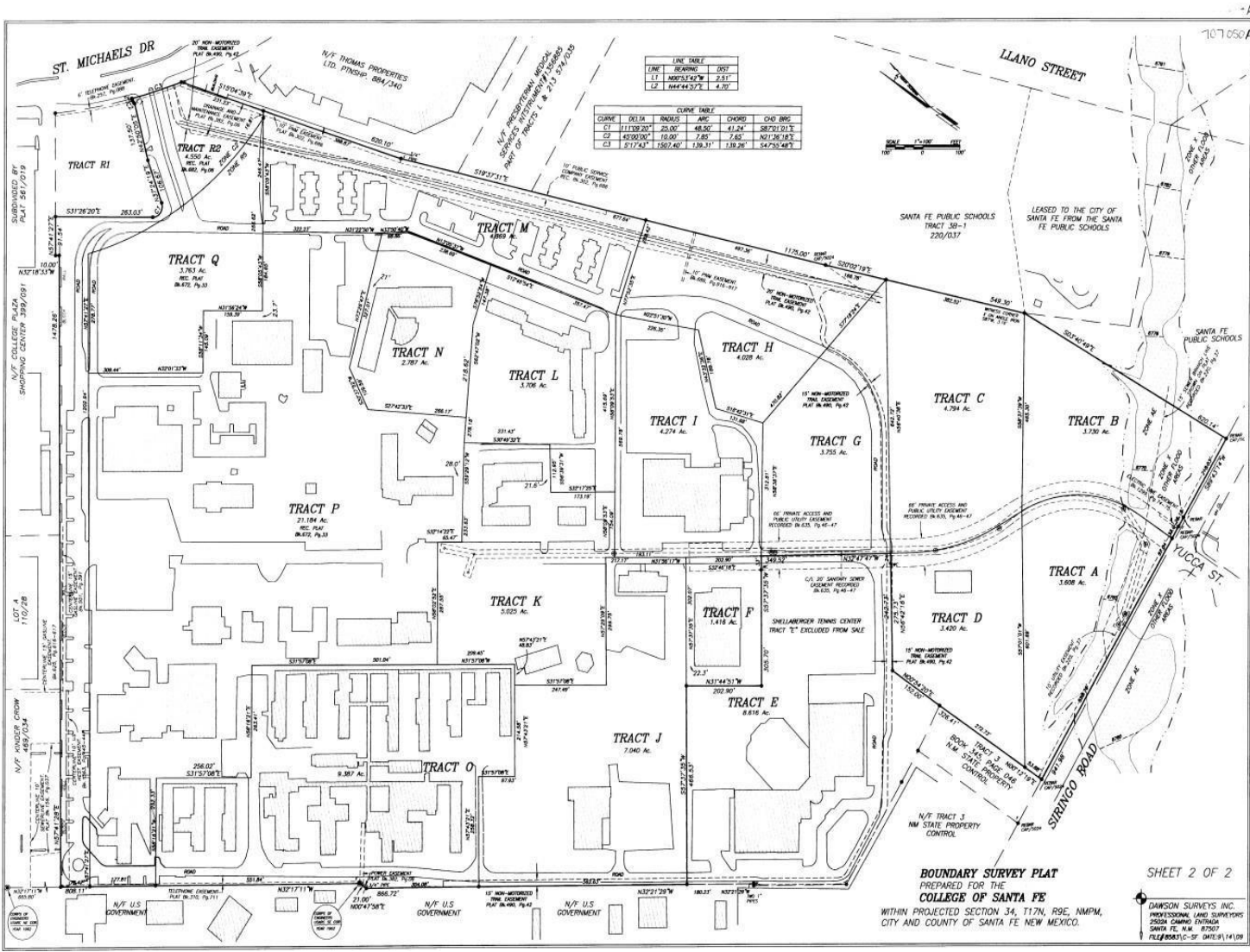
Witness my hand and Seal of Office  
VALERIE ESPINOZA  
County Clerk, Santa Fe County, N.M.

Deputy Lynette Halverson



SHEET 1 OF 2





**EXHIBIT B**

**GOOD FAITH DEPOSIT SCHEDULE**

PHASE 1 CALCULATION

INFRASTRUCTURE      \$15,000,000.00

UNM FACILITY          \$10,000,000.00

1%      \$25,000,000.00      TOTAL - PHASE 1

0.10    \$250,000.00

GOOD FAITH DEPOSIT \$25,000.00      TOTAL DEPOSIT

## **EXHIBIT C**

### **DEVELOPMENT FRAMEWORK SCHEDULE**

The following Tasks are outlined to provide the Master Developer and the City with information to develop terms for a Disposition and Development Agreement (DDA).

Outcomes of this ENA period include the creation of a development framework, which will be an exhibit to the DDA, and a master plan for land development.

#### **General Assessment Phase – Month 0-6**

##### **Initial Reconnaissance**

- Review Concept Development Proposals with the City’s Midtown Master Plan Committee, i.e. proposed Development Program, Site Plans, Phasing Plans and identify priorities to establish a baseline for all planning and development due diligence tasks and activities.
- Meet with Directors and key staff that head of each City Department represented on the Master Development Committee to further understand requirements, priorities, and goals.
- Meet with elected officials in individual meetings to understand desired outcomes and understand priorities; and, identify community leaders and organizations that have data or other information to also inform desired outcomes and to help identify priorities.
- Meet with Midtown Finance Committee to vet initial concepts regarding economic feasibility of development phases, to understand financial priorities, with a focus on Phase 1 development program.
- With Negotiation Committee, establish an outline for the Development Framework and Master Plan, and to verify the Development Framework Schedule assumptions, i.e. identify risks, communication and decision-making protocols, regular meetings and updates, etc.
- Meet with City’s Community Development Committee and Public Engagement Committee to identify critical community development objectives and to align public engagement process with City’s.
- Establish guiding principles for development focused on equity, environment, economic, e.g. sustainable development programs.
- Monitor Real Estate Market Data, adjust pro-forma analysis as conditions change.

##### **Site Control & Disposition**

- Identify preliminary projects in Phase 1 and organize necessary due diligence activities, assessments, and approvals that may be required.
- Gather relevant site documents and reports to establish a standard baseline understanding of the site.
- Assess existing Furniture, Fixtures & Equipment (FF&E) and make recommendation for disposition, reuse in development plan, and coordinate effort with public activation and engagement effort

### **Public Engagement Due Diligence**

Coordinate with the Community Development Committee to assess community development and public policy objectives and their impact on land economics and feasibility for implementation.

- Coordinate with Public Engagement Committee to develop and implement an engagement and activation plan of action that compliments and enhances community engagement activities with the City’s public engagement consultants. Note: the City will be procuring a public engagement consulting team to establish a community advisory group to develop, implement and manage a public engagement plan.
- Participate in public engagement activities and refine understanding of public priorities in evaluating the proposed development program and phasing

### **Horizontal Development Assessment Phase – Month 4-10**

Meet with relevant City Staff, State Regulatory authorities and other relevant stakeholders to establish a baseline understanding of the physical condition of the existing infrastructure and a high level understanding of the likely improvements that must be made to support the proposed development program.

Perform physical inspections of the existing infrastructure and buildings to establish a baseline understanding of the existing physical conditions and refine estimates of the costs of required repairs, upgrades or improvements.

Refine the Concept Plan to reflect changes required to respond to opportunities and concerns identified in the initial phases of Community Engagement due diligence.

Procure and deploy necessary consultants to undertake site assessments of the existing site conditions, including infrastructure, site soils, environmental, and existing building that will have an impact on development and financing assumptions.

### **Site and Civil Due Diligence**

- Develop an understanding and agreed upon strategy to implement the development program outlined in the conceptual plan.
- Assess existing soils conditions for new development

### **Building Due Diligence**

- Assess condition of existing buildings and determine suitability for permanent or temporary use, or demolition.
- Assess potential historical significance of existing buildings

### **Infrastructure Due Diligence**

- Assess infrastructure capacities and networks to understand and determine the ability of the infrastructure to support the development program outlined in the conceptual plan.
- Develop a preliminary schedule of costs, potential financial instruments, land valuation impacts, phasing and other methods for financing an Infrastructure Implementation Plan (draft).

### **Environmental Due Diligence**

- In coordination with City, develop an assessment strategy for the entire site.
- Perform environmental assessments and, if required, develop remediation plan with budget, and applications to relevant governmental agency for approval and implementation.

### **Transportation, Streets, and Circulation Due Diligence**

Assess existing transportation modes and develop a plan for development of primary street, public right of way, and utility networks, as well as secondary and tertiary circulation networks

### **Sustainable Site and Green Building Due Diligence**

- Identify key strategies to achieve City’s net-zero objectives and sustainable development goals.
- Meet with key non-profit organizations focused on sustainable development.
- Identify baseline certifications or measures that initial development phases are to achieve, e.g, 1-5 years.

**Finance Due Diligence**

- Perform reconnaissance tasks to develop the basis for City assumptions and expectations for disposition and the Master Developer’s assumptions and expectations for residual land valuation, much of which will be based on due diligence outlined above.
- Develop financing models with detailed assumptions for Phase 1 and projected assumptions for the complete Development Framework by phase.

Upon completion of the Horizontal Development Assessment Phase, Master Developer and City will update the initial infrastructure and development financing assumptions and models for the development of the site, as well as any development program assumptions.

**Development Framework Phase – Month 10-16**

The previous site and horizontal development due diligence work will inform the “Development Framework” which includes: Development Program, the Scheduling & Phasing Plan, the Development Budget and Financing Plan, the Due Diligence Reports, and the Legal Entitlement Applications.

**Development Framework and Master Plan Due Diligence**

During the ENA due diligence period, the Master Developer will work closely with the City, particularly the Master Development Committee and Community Development Committee to develop the Development Framework, which includes a Master Plan for purposes of submitting entitlement application to the City.

*Pre-Development / Planning Phase – Horizontal Development*

Determine the most feasible and desirable horizontal development requirements based on the due diligence tasks and activities outlined above.

In collaboration with Land Use Department, develop a viable master plan, general plan amendment, and zoning ordinance for approval and implementation of the proposed Development Framework.

- Develop with Land Use Department and Master Development Committee new Midtown District Design Guideline parameters, particularly for public-right-of ways, bulk and height, set-backs, and other standard planning and urban design standards.
- Submit applications for general plan amendment and rezoning ordinance.
- Conduct and facilitate public hearings and public engagement meetings related to the master plan and land uses, and planning approval process.

*Pre-Development / Planning Phase - Vertical Development*

Each Vertical Project Developer, development partner, will be responsible for the pre-development activities required to secure entitlements and financing required to build their proposed project. The Master Developer will participate in these pre-development tasks as a limited or special limited partner. In addition, the Master Developer will be required to perform the following tasks;

- Negotiate sales contracts, joint venture agreements or leases to development entities that are consistent with land values and development plan.
- Co-ordinate design review to ensure that the designs are consistent with the Master Plan and associated design guidelines.
- Ensure that site plans are consistent with Master Plan, including utility, streets, and public right-of-way requirements.
- Work with existing tenants and leaseholders on-site to co-ordinate construction schedules and staging to minimize disruption to ongoing activities and uses.
- Analyze and incorporate community development and public objectives into the terms of the disposition and development agreement.
- Establish a Midtown District Association, a special purpose entity with the power to assess fees on property owners within the district to pay for management and maintenance, programming and other operating costs of public spaces.

Upon completion of the ENA due diligence and negotiation period, the Master Developer will have valuable inputs that can be used to determine capital costs and potential interim

revenue streams that can be factored into the terms of the DDA.

## **Other Due Diligence Activities**

### **Legal Due Diligence**

- Master Developer is responsible for establishing the corporate development entity for DDA and obtain all relevant governmental local, state, and federal governmental certifications.
- Master Developer is responsible for establishing the corporate entities for individual projects.
- Master Developer is responsible for procuring and executing all contracts for services related to undertake and complete the ENA due diligence and negotiation activities.

Master Developer is responsible for applying for and obtaining governmental approvals and permits for the proposed development, unless there is funding other specific advantage for the City to be the applicant for approval.

### **Public Engagement - Ongoing**

- Engage with the public to gather input on components of the Conceptual Plan and Development Framework to balance Community Development, Community Enrichment and Financial goals.
- Coordinate with, and participate in, the public engagement plan to be developed with the City's public engagement consultant team.
- Collaborate with the Community Development Committee in vetting and establishing Community Development and Public Policy objectives for implementation, which will be incorporated into the DDA.
- Develop monthly briefs summarizing ENA tasks and activities for communications purposes to city council, mayor, Midtown District Committees. Briefs may be posted on the City and project websites.
- Branding and Marketing: Master Developer to coordinate with Midtown Steering Committee and Public Engagement Committee to develop a branding and marketing plan for the Midtown District that is consistent with a public vision.



**EXHIBIT D**

**DEVELOPMENT FRAMEWORK TEAM ROSTER**

MASTER DEVELOPER FINALIST	MASTER DEVELOPERS	PROJECT DEVELOPERS	BUILDING OWNERS / MASTER LESSEE	BUILDING TENANT	PUBLIC ENGAGEMENT	URBAN DESIGN/ ARCHITECTURE	ARTS & CULTURE	OTHER TEAM MEMBERS
<i>(Team Midtown Santa Fe)</i>	KDC Real Estate	KDC Real Estate	Pacifica Partners, Film	Youthworks	Sage Morris-Greene, Project Coordinator	Stantec	Santa Fe Arts Institute	Phase One Realty, Residential and Commercial sales and lease
KDC Real Estate Development & Investments / Cienda Partners	Cienda Partners	Cienda Partners	██████	UNM		Autotroph	Live Arts	
		Pacifica Partners, Film Homewise YES Housing La Fonda	Santa Fe Arts Institute	SFCC  Christus S. Vincent		Hogan Group	██████ ██████	

## **EXHIBIT E**

### **ACCESS LICENSE AGREEMENT**

This Access Agreement (“Agreement”) is made effective as of the date of the last signature hereto (“Effective Date”) by and between the **City of Santa Fe**, New Mexico, a municipal corporation (“City”, “Grantor”), and **KDC Cienda SF Investments One L.P.** (“KDC/Cienda”, “Grantee”).

#### **Recitals**

A. The Grantor owns real property with an address at 1600 St. Michaels Drive located in the City and County of Santa Fe, New Mexico, also known as the Midtown Site (“Property”).

B. The Grantee is a master developer selected to perform standard and professional real estate due diligence activities at Property in furtherance of creating a viable development plan and terms for the disposition of the Property and pursuant to an executed Exclusive Negotiation Agreement (“ENA”)

C. The Grantor and Grantee are discussing the disposition and conveyance of the Property to the Grantee (the “Transaction”), to allow for the implementation an approved development plan.

D. As part of such due diligence, the Grantee has requested, and the Grantor has agreed, that the Grantee be allowed to access the entire Property to conduct inspections, assessments, investigations, sampling and testing of the Property and the soils, structures, and improvements thereon, on the terms and provisions of this Agreement.

#### **Agreement**

NOW THEREFORE, in consideration of the foregoing Recitals, the Transaction, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Grantor and Grantee covenant and agree as follows:

1. **Grant of Access.** Subject to the terms of this Agreement, the Grantor grants the Grantee a temporary, nonexclusive License for the term hereof under, over, on, and across the Property for the benefit of the Grantee, its agents, employees, consultants, and contractors and their respective subcontractors at every tier, and all others providing services in connection with the Transaction (the “License”).

2. **Access Studies.** Subject to the notice provisions of Section 3 below, the Grantee shall use the License for purposes of inspections, diligence, sampling, testing, and invasive and non-invasive studies (collectively, the “Access Studies”) of the Property. The Access Studies may include conducting such tests, feasibility studies, environmental studies, appraisals, and engineering studies as the Grantee may elect, to determine whether the Property is satisfactory for the Grantee’s contemplated use thereof.

2.1. The Grantee agrees that, when possible, the Access Studies will be conducted in a manner so as not to physically damage the Property. The Grantor agrees, however, that the Access Studies may include invasive testing, including without limitation soil samples, drilling or boring, and removal of improvements or surfaces for environmental, geotechnical, archeological or other studies and testing.

2.2. The Grantee agrees that all Access Studies will be conducted in a manner that least disturbs the tenants of and visitors to the Property, and does not unreasonably interfere with the usual operation of the Property by the Grantor and its tenants. The Grantor will cooperate, and will cause its tenants to cooperate, with the Grantee with respect to the Access Studies.

3. **Notice.** Other than incidental access to the Property, the Grantee shall provide notice of its intended access and Access Studies as provided in this Section.

3.1. The Grantee will provide the Grantor with prior notice of any access onto Property for purposes of a non-invasive Access Study, which notice shall state the nature, location, and times proposed. Such access and Access Study shall be permitted unless the Grantor responds within two (2) business days after receipt of the notice that the proposed access or Access Study is not convenient, which response will include convenient times at which the Grantee may reschedule.

3.2. The Grantee will provide the Grantor with at least five (5) business days’ prior written notice of any access onto Property for purposes of an invasive Access Study, as described in Section 2.1 above. Such notice shall state the nature, location, and times proposed for such access. The invasive Access Study may proceed upon written approval by the Grantor provided within three (3) business days after receipt of the notice, which approval shall not be unreasonably withheld, conditioned, or delayed.

#### 4. **Repair of Foundation Property.**

4.1. The Grantee will restore the Property to the same condition in which it existed immediately prior to the conducting of any inspection or testing, promptly upon completion of each such inspection. The Grantee will not permit any liens or encumbrances to arise against the Property in connection with or as a result of such Access Studies.

4.2. If any portion of the Property is damaged as a result of the Grantee's Access Studies, the Grantee shall repair or restore the damaged property to substantially the condition that existed immediately prior to such damage and shall pay all costs and expenses associated therewith.

5. **Term.** The License granted herein shall terminate on the first to occur of (i) the parties' declination to proceed with the Transaction, including the termination of any transfer agreement for the Property, or (ii) the date of closing of the Transaction.

6. **Compliance with Laws.** The Grantee shall comply with all laws, rules, regulations and orders of federal, state, and local governmental agencies that are applicable to the Property and the Access Studies conducted on or about the Property by or on behalf of the Grantee.

7. **Hazardous Materials.** The Grantee shall refrain from discharging any hazardous wastes or toxic substances on or about any portion of the Property, other than such substances as may be commonly used by qualified persons in connection with the Access Studies, which use shall be subject to the repair obligations described in paragraph 3 above.

8. **Insurance.** As a condition to the exercise of the rights granted herein, the Grantee shall maintain, and cause its contractors entering onto the Property to maintain, the following insurance, and will provide the Grantor with current certificates of insurance and copies of insurance policies evidencing the required insurance coverages. The policy shall be endorsed to include the City of Santa Fe, as additional insured for all ongoing and completed operations.

Exhibit E: Insurance Requirements of the Midtown Development Exclusive Negotiation Agreement shall apply to the Access Studies in connection with this Access License Agreement.

9. **Indemnity.** To the extent permitted by law, the Grantee shall indemnify, defend and hold harmless the Grantor from and against all claims arising out of or related to the Grantee's Access Studies, except to the extent such claims are caused by the negligent acts or omissions of the Grantor or any other tenant of the Property; provided, however, that this indemnity shall not extend to, and the Grantee shall not be liable to the Grantor for, (a) any release of pre-existing hazardous substances arising from the conduct of any investigation or testing of the Property, or for any diminution in the market value of the Property resulting from the information disclosed by any such investigation or test, (b) for any negligence or misconduct of the Grantor or any agent, contractor or employee of the Grantor, or (c) any pre-existing conditions on or about the Property.

10. **Miscellaneous.**

10.1. Time is of the essence in this Agreement.

10.2. This Agreement contains the entire agreement of the parties hereto with respect to the subject matter of this Agreement and no representations, inducements, promises or agreements, oral or otherwise, between the parties not embodied herein shall be of any force and effect.

10.3. This Agreement may be modified only by a written document signed by both parties. No provision of this Agreement shall be deemed waived by either party unless such waiver is in writing and signed by the party making such waiver. No custom or practice between the parties in connection with the terms of this Agreement shall be construed to modify the Agreement or waive either party's right to insist upon strict performance of the terms of this Agreement.

10.4. The parties acknowledge that this Agreement is the result of negotiations between the parties, and in construing any ambiguity hereunder no presumption shall be made in favor of either party.

10.5. This Agreement shall be interpreted under and governed by the laws of the State of New Mexico. The Parties agree that any action or suit arising from this License shall be commenced in a federal or state court of competent jurisdiction in New Mexico. Any action or suit commenced in the courts of the State of New Mexico shall be brought in the First Judicial District Court. The prevailing party in any action or proceeding arising out of this Agreement shall be entitled to recover costs including reasonable attorneys' fees from the other party.

10.6. EACH PARTY WAIVES TRIAL BY JURY IN THE EVENT OF ANY LEGAL PROCEEDING BROUGHT BY THE OTHER IN CONNECTION WITH THIS AGREEMENT.

10.7. The Recitals set forth at the beginning of this Agreement are incorporated herein by reference. The headings of this Agreement have been inserted for convenient reference only and are not to be considered in the construction of any provision hereof.

10.8. This Agreement may be executed in counterparts that together will be a single agreement.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed as of the Effective Date.

**Grantee:**

KDC Cienda SF Investments One L.P.

Date: \_\_\_\_\_

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

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

Title: \_\_\_\_\_

**Grantor:**

City of Santa Fe, New Mexico

Date: \_\_\_\_\_

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

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

Title: \_\_\_\_\_

**EXHIBIT F**

**INSURANCE REQUIREMENTS**

Master Developer shall procure and maintain, or cause its subcontractors and subcontractors to procure and maintain the following insurance policies, through the Initial Term and any Extended Term, in the following amounts and with the following terms and conditions:

- 1.1 Intentionally Deleted.
- 1.2 Master Developer and its consultant and/or subcontractors shall provide to and for approval of the City valid duplicate original Certificates of Insurance and/or, at the City's option, a certified copy of the insurance policies and any and all endorsements of riders thereto, evidencing compliance with all requirements contained in this Agreement, all in form and substance satisfactory to the City. The Master Developer and its consultants and/or subcontractors shall provide City with proof of payment of premiums in full for the current annual period or, if such premiums are financed, evidence that premiums are current. The Master Developer and its consultants and/or subcontractors shall be required to provide 30 days prior notice to City of any material changes to the policies, including but not limited to impairment of liability limits, that impact the required insurance coverage hereunder.
- 1.3 Acceptance and/or approval of the insurances herein does not and shall not be construed to relieve Master Developer and its consultants and/or subcontractors from any obligations, responsibilities or liabilities under the Agreement.

- 1.4 All insurances required by the Agreement shall: (i) be obtained at the sole cost and expense of the Master Developer and its consultants and/or subcontractors; (ii) be maintained with insurance carriers properly licensed to do business in all states required by the terms of this Agreement, and acceptable in all respects, to the City; (iii) be “primary” and non-contributing to any insurances maintained by City; (iv) contain a Waiver of Subrogation in Favor of the City (except for Professional Liability Insurance), so that in no event, shall the insurance carriers have any right of recovery against the City or its employees, (v) provide that written notice be given to the City and all additional insureds and certificate holders at least ten (10) days prior the cancellation, non-renewal or modification of any such policies, which notice shall be evidenced by return receipt of United States certified mail; and (vi) designate the City and any subsidiary, parent or affiliates of the City and its partners, directors, officers, agents, and employees or others or entities with an insurable interest designated by the City as additional insureds thereunder (except for Workers Compensation and Employer’s Liability insurances and Professional Liability Insurance).
- 1.5 The Master Developer and its consultants and/or subcontractors shall not take any action, or omit to take any action that would suspend or invalidate any of the required coverages during the time period such coverages are required to be in effect.
- 1.6 Not less than ten (10) days before the expiration date or renewal date, the Master Developer and its consultants and/or subcontractors shall supply the City with updated replacement Certificates of Insurance, amendatory riders, and



- endorsements, and/or certified copies of insurance policies, together with evidence of payment of the premium, that clearly evidence the continuation of all of the terms and conditions of the coverage, limits of protection, and scope of coverage as provided by the expiring Certificates of Insurance, certified copies of insurance policies and amendatory riders or endorsements originally provided.
- 1.7 If the Master Developer and its consultants and/or subcontractors shall fail to purchase and maintain, or fail to require to be purchased and maintained, the insurance specified in this Agreement, City may (but shall not be obligated to) purchase such insurance on behalf of the Master Developer and its consultants and/or subcontractors and the Master Developer and its consultants and/or subcontractors shall reimburse the City for any premiums paid therefor.
- 1.8 The Master Developer and its consultants and/or subcontractors shall select reputable and financially sound insurers acceptable to City to underwrite the required coverages. In all instances, each insurer selected must be rated at least “A-” Class “X” in the most recently published Best’s Insurance Report.
- 1.9 There shall be no exclusion for damages due to acts of terrorism.
- 1.10 No act or omission of any insurance agent, broker or insurance company representative shall relieve Master Developer and its consultants and/or subcontractors of any of its obligations under this Agreement.
- 1.11 Master Developer will procure and maintain the following insurance with limits of liability not less than specified below.
- A. Commercial General Liability Insurance written on a per occurrence basis with a One Million Dollar (\$1,000,000) per occurrence limit and a Two Million Dollar

(\$2,000,000) general aggregate. This limit may be provided through a combination of primary and umbrella/excess liability policies. Such insurance shall include the following coverages:

1. Premises, Operations and Products/Completed Operations coverage.
  2. Products/Completed Operations coverage shall extend for a period of at least twelve (12) months after the date of final completion and acceptance by the City of all of Master Developer and its consultants and/or subcontractors' Work.
  3. Contractual Liability coverage for the contractual liabilities assumed under this Agreement.
  4. Personal Injury and Advertising Injury Liability.
- B. Worker's Compensation, Occupational Disease Benefits, Voluntary Compensation, and Disability Benefits, Defense Base Act, and any other federal and/or state coverages, as required, for not less than the statutory limits, and if applicable, an "Other States Endorsements"; Employers' Liability Insurance or Stop-Gap Employers' Liability Insurance with limits of not less than One Million Dollars (\$1,000,000) each accident, by disease One Million Dollars (\$1,000,000) each employee.
- C. Comprehensive Business/Automobile Liability Insurance to include uninsured/underinsured and medical payment protection covering any automobile, including owned, leased, hired, and non-owned automobiles, with a combined single limit for Bodily Injury and Property Damage of not less than One Million Dollars (\$1,000,000) per accident.
- D. Professional Liability Insurance covering Errors and Omissions, with limits of liability of not less than One Million Dollars (\$1,000,000) per claim with a one-year

completed operations period. Local Small, Minority, or Woman Business Enterprise (“**Disadvantaged Business Enterprise**”, “**DBE**”) consultants may be utilized. If DBE’s limits are lower than the required limits, such lower DBE limits must be approved in writing by City in advance. Each such policy shall have a reasonable deductible or self-insured retention. Such insurance shall remain in force during the period when such Contractor and its consultants and/or subcontractors services are performed and for a period of one (1) year after the completion of the Scope of Work.

E. If performing any invasive testing or consulting services relating to any environmental services or handling of hazardous materials, contractors pollution liability coverage with commercially reasonable limits and deductibles or self-insurance retention.

1.12 The parties identified on **Exhibit F** shall be named as additional insureds on the Master Developer’s policies (with the exception of Worker’s Compensation and Employer’s Liability insurances and Professional Liability Insurance). Coverage provided to the additional insureds will include protection for Products/Completed Operations Hazard.

## **EXHIBIT G**

### **ADDITIONAL INSUREDS**

- (1) City of Santa Fe, and each of the City's officers, agents, employees, and representatives;
- (2) Any present or future mortgagee which encumbers an interest in the land or improvements located at the Property, together with their respective directors, officers, employees or agents, and any successors and assigns of such entities; and
- (3) Such other and additional entities and/or individuals as may be identified by Owner to Contractor in writing.






# 2020-5-04 KDC\_Cienda -City of Santa Fe-Final ENA\_Final 2

Final Audit Report

2020-05-04

Created:	2020-05-04
By:	Irene Romero (ikromero@ci.santa-fe.nm.us)
Status:	Signed
Transaction ID:	CBJCHBCAABAACqf8lvJ1FppsnrHZRvZApic60FShu7yh

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-  **Document e-signed by Erin McSherry (ekmcsherry@santafenm.gov)**  
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2020-05-04 - 2:58:22 PM GMT

Signature:   
Scott Ozymy (May 4, 2020)

Email: [scott.ozymy@kdc.com](mailto:scott.ozymy@kdc.com)






# 2020-5-04 KDC\_Cienda -City of Santa Fe-Final ENA\_Final 2 - signed

Final Audit Report

2020-05-04

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By:	Irene Romero (ikromero@ci.santa-fe.nm.us)
Status:	Signed
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# 2020-5-04 KDC\_Cienda -City of Santa Fe-Final ENA\_Final 2 - signed CA- signed SO

Final Audit Report

2020-05-04

Created:	2020-05-04
By:	Irene Romero (ikromero@ci.santa-fe.nm.us)
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