

**CITY OF PEORIA, ARIZONA
COUNCIL COMMUNICATION**

cc: 3C
Amend No. _____

Date prepared: January 10, 2011

Council Meeting Date: February 1, 2011

TO: Carl Swenson, City Manager
THROUGH: Susan J. Daluddung, Deputy City Manager
FROM: Scott Whyte, Economic Development Services Director
SUBJECT: City Council authorization to enter into an Exclusive Negotiating Agreement with Osage West, LLC on the North Peoria Municipal Airport/Airpark Project

RECOMMENDATION: Authorize the City Manager to enter into an Exclusive Negotiating Agreement with Osage West, LLC on the North Peoria Municipal Airport/Airpark Project.

SUMMARY:

Osage West, LLC has developed a plan to build a municipal airport on a 2,240-acre property in northern Peoria. The project includes plans to build a municipal airport on 400 acres and a manufacturing, industrial, business park on the remaining 1,840 acres. The purpose of the ENA is to provide both Osage West and the City freedom to explore this opportunity in depth and to negotiate potential public/private partnership for the financing, acquisition, development, and operation of the project.

ATTACHMENT: The Exclusive Negotiating Agreement is attached for your review.

CONTACT: Maria Laughner at 623-773-5121

OSAGE WEST, LLC
Confidentiality, Non-Disclosure, and Non-Circumvention Agreement

(The Peorian at The Sports Center Retail District)
(Peoria Municipal Airport and Business Airpark)

This is intended to be a legally binding agreement. Read it carefully before signing.

Osage West, LLC, an Arizona limited liability company ("Developer"), and the City of Peoria, Arizona, a charter municipal corporation ("City"), are executing this Agreement as of this date, _____, 2011, in connection with the distribution and/or receipt herewith of certain confidential and proprietary information relative to the proposed projects referenced as: 1) The Peorian at The Sports Center Retail District and 2) Peoria Municipal Airport and Business Airpark ("the Projects") to be located in the City of Peoria, Arizona.

Certain materials and information including but not limited to the Projects' description books, current and all future financial information concerning the Projects and the Developer and Investor principals, including all pro-forma costs, expenses, and revenue, all letters of intent to lease, leases, and other agreements, the Memorandum of Understanding between the principals, limited liability company operating agreements, construction contracts, requests for bids and bid submittals, and other documents and information whether oral and/or written with respect to the Projects whether delivered or made available concurrently with this Agreement or to be delivered in the future, collectively, the "Proprietary Information" shall be subject to the terms of this Agreement.

The City acknowledges and agrees that the Proprietary Information is confidential and is intended solely for the City's limited use and benefit in determining whether the City desires to express any further interest in the Projects.

With respect to the Proprietary Information, the City acknowledges that any confidential information disclosed to others may be damaging to the Projects and Developer and its principals. It is understood that confidential information includes: the fact that the Projects are under consideration for development; consideration of land acquisition; financial details; project details; and any other disclosed information not generally known by public.

Therefore, the City agrees as follows:

- a. To use the information solely for the purpose of evaluation of the Projects and/or the proposed transaction and not for purposes of gaining information for development competitors, the IRS, or any other taxing agency.
- b. All copies of material and data provided shall be confidential and shall be returned to the Developer in the event that a decision is made not to pursue any interest whatsoever in the Projects.
- c. Such documents shall not be disclosed by the City or any of its officers, employees, or agents to any third party, absent prior written consent by the Developer, unless such disclosure is or would be required pursuant to the Arizona Public Records Law (see Arizona Revised Statutes, Title 39, chapter 1, Article 2) or by a court order. In such event, the City will promptly notify the Developer that disclosure is required by the Public Records Law or a court order. To not disclose confidential information to anyone other than his/her advisors and/or affiliates who shall also agree to be bound by the same confidentiality. To be fully responsible for any breach of this Agreement caused by such employees, representatives, consultants, affiliates and/or agents.

The Developer and the City further understand and agree that:

- a. The information is being delivered or made available to the City with the understanding that the City will independently investigate those matters which the City deems appropriate in evaluating the proposed Projects and transactions.
- b. Neither the City nor its agents will contact the owner, landlords, employees, suppliers, or any other person related to said Projects except through or with the written permission of the Developer. All correspondence, inquiries, offers to purchase, and negotiations relating to the Projects shall be presented exclusively to the Developer.
- c. Each Party agrees that in the event of any breach of this Agreement by it, that, in addition to all other remedies available to the other Party at law or in equity, the other Party shall be entitled as a matter of right to apply to a Court of competent jurisdiction for such relief by way of restraining order, compliance with provisions of this Agreement. If any litigation should arise out of this Agreement, the prevailing Party shall be entitled to an award of reasonable attorneys' fees, costs, and expenses in addition to any other relief to which that Party may be entitled.
- d. The City and/or its agents shall not circumvent nor interfere with any of the Developer's contractual obligations which would reasonably be construed as a sale or transfer of interest, in whole or in part, in the Projects. Should the City and/or its agents circumvent and affect any such transactions of the Developer they shall immediately become severally liable for all damages and remediation that the Courts may provide.
- e. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Arizona, and venue shall be in either the Superior Court for Maricopa County or the United States District Court for the District of Arizona.
- f. This Agreement may be terminated by the City for conflict of interest in accordance with Arizona Revised Statutes, Section 38-511.
- g. The term of this Agreement shall be for one (1) year from the date indicated in the first paragraph and may be extended for an additional one (1) year term upon the mutual agreement of the Parties in writing. Upon expiration, the Parties' respective duties and obligations under this Agreement shall cease.

All notices and other communications provided for herein or given in connection herewith will be validly given, made, delivered, or served if in writing and delivered personally or sent by registered or certified United States Postal Service Mail, return receipt requested, postage prepaid to:

If the City: Director
 Economic Development Services
 City of Peoria
 9875 N. 85th Avenue
 Peoria, Arizona 85345

With a copy to: City Attorney
 Office of the City Attorney
 City of Peoria
 8401 West Monroe Street
 Peoria, Arizona 85345

If the Developer: Mike Oliver
 Osage West, LLC
 c/o REDEV Advisory Group, LLC
 2601 E. Thomas Rd. #220
 Phoenix, AZ 85016

We, the undersigned, understand and agree that this Agreement is legally binding upon us and all our agents involved in the analysis and evaluation of the disclosed confidential information. We acknowledge that we have read and understand the disclosures contained herein. This is intended to be a legally binding agreement. Read it carefully before signing.

Osage West, LLC, an Arizona limited liability company



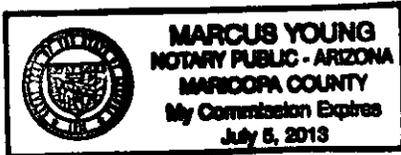
Michael Oliver, CEO/Principal

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing Agreement was acknowledged before me this 6th day of January 2011, by Michael Oliver, CEO/Principal of Osage West, LLC, an Arizona limited liability company, for and on behalf of Osage West, LLC.

Notary Public

My Commission Expires: 7/5/13



CITY OF PEORIA, ARIZONA, an Arizona charter municipal corporation

By:
for Carl Swenson, City Manager

ATTEST:

Wanda Nelson, City Clerk

APPROVED AS TO FORM:

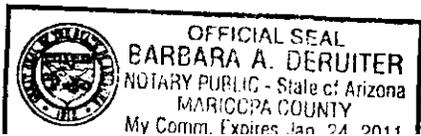
Stephen M. Kemp, City Attorney
Ellen Van Riper, Assistant City Attorney

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing Agreement was acknowledged before me this 11th day of January 2011, by Carl Swenson, City Manager for the City of Peoria, Arizona, an Arizona charter municipal corporation.

Notary Public

My Commission Expires:



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**EXCLUSIVE NEGOTIATION AGREEMENT
FOR NORTH PEORIA MUNICIPAL AIRPORT/AIRPARK**

This Exclusive Negotiation Agreement for the development of a north Peoria Municipal Airport/Airpark (this "Agreement") is entered into this 6 day of JAN 2011 (the "Effective Date"), by and between the CITY OF PEORIA, ARIZONA, a charter municipal corporation (the "City") and OSAGE WEST, an Arizona limited liability company ("Osage West"), on the terms and conditions set forth below. The City and Osage West may sometimes be referred to herein individually as a "Party" and collectively as the "Parties."

RECITALS

WHEREAS, the City and Osage West are interested in pursuing development of a municipal airport and airpark in northern Peoria on an approximately 2240-acre property (the "Project"). A preliminary site plan for the Project is attached as Exhibit "A".

WHEREAS, the Parties intend for the Project to include development of a 400-acre municipal airport and a 1840-acre manufacturing, industrial, and business park as depicted on Exhibit "A."

WHEREAS, the City and Osage West are interested in exclusively negotiating with each other for the purpose of forming a public/private partnership for the financing, acquisition, development, and operation of the Project.

WHEREAS, the City and Osage West desire to establish a period of time during which the Parties will exclusively negotiate with each other in good faith to establish the Project structure, site planning, operating pro formas, development pro formas, and any other related and necessary documents to finalize the Project development concept and determine financial feasibility.

NOW THEREFORE, in consideration of the mutual promises contained herein, and for other good and valuable consideration, the Parties agree as follows:

AGREEMENT

1. Good Faith Negotiation

The Parties agree, during the Term (as defined in Section 3 below), to negotiate diligently and in good faith to determine the financial feasibility of the Project and

attempt to agree in writing upon the terms of a development concept for the Project, which shall be memorialized by a Development Agreement.

2. Confidentiality

The Parties agree that the negotiations conducted pursuant to this Agreement are encompassed by and will be subject to the Confidentiality, Non-Disclosure, and Non-Circumvention Agreement executed by Osage West, LLC, an Arizona limited liability company, and the City dated JAN 6, 2011. A copy of such Confidentiality Agreement is attached hereto as Exhibit "B" and is incorporated herein by this reference as if it were set forth in full herein.

3. Term

This Agreement shall commence upon the date the City approves and all Parties execute this Agreement (the "Effective Date") and shall automatically terminate one calendar year (365 days) thereafter (the "Term"). The Parties agree to negotiate diligently and in good faith and conduct due diligence activities during the Term and any extension(s) thereof mutually agreed upon in writing by the Parties. The Parties also agree to provide progress reports to each other and to otherwise regularly communicate with each other as they undertake and perform their respective obligations under this Agreement. The Parties further agree to provide any and all reasonably requested information pursuant to a request by one Party to the other. Any information provided shall be true, correct, and complete and shall not state, or omit, any information that would render the remaining information untrue or misleading.

4. Breach, Cure, Remedies, and Termination

(a) In the event that a Party fails to perform any obligation imposed by this Agreement, including failing to negotiate diligently and in good faith, the non-breaching Party shall provide written notice of such breach to the other Party. The Party receiving the written notice shall have ten (10) business days after receipt of such written notice within which to remedy such breach unless additional time is reasonably required to remedy the breach, in which event the Party shall commence the cure of the breach within the ten (10) business day time period and thereafter diligently pursue the cure to completion.

(b) If the Party in breach fails to remedy the breach in a timely and reasonable manner as provided in Section 4(a) above, the Parties agree that the Party who provided written notice of such breach may cancel and terminate this Agreement by

providing written notice of termination to the other Party. In the event of such termination, the Parties shall be fully and completely released from all of their respective rights, duties, obligations, and liabilities under this Agreement.

(c) In addition to the termination rights under Section 4(a) and (b) above, (i) each Party shall also have the right to terminate this Agreement in the event that any or both of the Parties determine that an impasse has been reached in negotiations under this Agreement, in the determining Party's sole and unreviewable discretion; (ii) the City shall have the right to terminate this Agreement for conflict of interest pursuant to A.R.S. § 38-511; and (iii) this Agreement may be terminated at any time upon the mutual written agreement of the Parties. In the event of any termination under the preceding sentence, the Party exercising the termination right shall provide written notice of termination and the applicable basis above to the other Party, and, upon the delivery of a valid notice of termination in compliance with this Agreement, the Parties shall be fully and completely released from all of their respective rights, duties, obligations, and liabilities under this Agreement.

5. Joint Project Feasibility and Development Issues

During the Term and any extensions thereof, the Parties shall use their collective good faith efforts to cooperatively determine or identify the following:

(a) The infrastructure needed to support the Project including, but not limited to, water capacity (supply and treatment); sewer capacity (treatment and disposal); roadways; electric power; natural gas; telephone; and fiber optic.

(b) Potential end users for the Project appropriate to the City's targeted industries as articulated in the adopted Economic Development Implementation Strategy ("EDIS"), and targeted end user needs in terms of infrastructure, site, and building usage.

(c) Proximity, transportation, and topography issues including, but not limited to, potential impacts caused by a municipal airport in proximity to Luke Air Force Base; re-alignment of Lake Pleasant Parkway to accommodate an airport; regional transportation issues (Loop 303, improvements to Lake Pleasant Parkway, expansion of Carefree Highway, and New River Parkway); and floodplains and regional drainage.

(d) Identify areas for collaboration, including, but not limited to attraction strategies for new businesses and industries to the Project; regional transportation issues; infrastructure assessments and targeted end user needs (infrastructure, site,

and building needs); obtaining a Foreign Trade Zone (“FTZ”) designation for the Project; and provision of fire and police services to the Project.

(e) Identify the roles of the Parties in implementing the Project. Osage West shall plan, construct, and lease/sell the Project. The City shall assist in Project development, as well as with timely review, processing, and comment on the development concept plan and submitted plans, and will also assist in resolving issues with affected governmental agencies (e.g., ADOT, Arizona State Land Department, Luke Air Force Base, Maricopa County Flood Control District, Maricopa County, Army Corps of Engineers, etc.). The City will also determine its role in the ownership and operation of an airport and any role in financing of an airport.

(f) Identify Federal and State funds, including, but not limited to grants and low interest loans, that may be utilized to offset acquisition and infrastructure development costs.

6. Costs and Expenses

(a) Osage West shall pay all costs actually incurred by it or its consultants or agents in performing its obligations under this Agreement and any internal costs are charges related to Osage West’s performance of its obligations under this Agreement.

(b) City shall bear all costs and expenses of any and all title, environmental, physical, engineering, financial, and feasibility investigations, reports and analyses, and other analyses or activities performed by or at its direction in fulfilling its obligations under this Agreement.

7. Timetable for Final Project Concept

The Parties agree to use their reasonable good faith efforts and to diligently adhere to the following timeframes in performing their respective obligations under this Agreement:

- | | |
|-----------------------|--|
| (a) February 28, 2011 | Preliminary meetings with State and City re: land acquisition. |
| (b) April 30, 2011 | Submit site plans for Airport and Industrial Park. |
| (c) May 31, 2011 | Preliminary acquisition strategy and design for |

Project. Memorandum of Understanding (MOU) for 2240 acres.

(d) Date to be determined Finalize and enter into a Development Agreement (DA).

8. City Retention of Legislative Authority and Discretion

(a) The Parties understand and agree that by entering into this Agreement, the City is not thereby contractually obligating the Peoria City Council to take any legislative action(s) in furtherance of the Project; rather, the City is obligated to proceed in good faith and with due diligence and work cooperatively with Osage West to timely present any necessary legislative approvals for the Project to the Peoria City Council for its consideration and possible approval.

(b) The Parties further understand and agree that the City reserves its right to exercise its discretion as to all matters which it is, by law, entitled or required to exercise its discretion, including legislative matters, such as approval of a Development Agreement, final approval of a development plan for the Project, approval of any and all plans or permits, or any other acts or activities requiring the subsequent independent exercise of discretion by the City or any Department thereof.

(c) The Parties also understand and agree that by its execution of this Agreement, the City is not committing itself, or agreeing to undertake any activity requiring the subsequent exercise of discretion by the City or any Department thereof, including, but not limited to, the approval and execution of a Development Agreement, approval of any land use regulation governing the Project property, the provision of financial assistance for the development of the Project, the authorization or obligation to use the City's eminent domain authority, or any other such action. The City's execution of this Agreement is merely an agreement to enter into a period of exclusive negotiations according to the terms hereof, reserving final discretion and approval by the City as to approval of a Development Agreement and all proceedings and decisions in connection therewith.

9. Assignment

No Party may assign this Agreement without first obtaining the advance written approval of the other Party, which approval may be granted or withheld in the sole and unfettered discretion of such other Party. The City agrees that, notwithstanding the foregoing, Osage West may assign without the prior written approval of the City, but

with thirty (30) days prior written notice to the City, its respective rights, duties, obligations, and liabilities under this Agreement to a limited liability company, corporation, trust, or partnership of which Osage West owns the majority beneficial interest and has operational control.

10. Representations and Warranties

(a) Osage West represents and warrants that it is an Arizona limited liability company duly formed and validly existing under the laws of the State of Arizona and is in good standing in the State of Arizona.

(b) Osage West represents and warrants that the person(s) executing this Agreement on its behalf has full right, power, and authority to execute this Agreement and bind Osage West hereunder.

11. General Provisions

(a) **Applicable Law and Venue.** The laws of the State of Arizona shall govern the interpretation and enforcement of this Agreement, without regard to conflicts of laws principles. Any mediation, arbitration, or legal proceedings initiated to enforce the terms and conditions of this Agreement shall be conducted in Peoria, Arizona, or in the Maricopa County Superior Court or the United States District Court for the District of Arizona, as appropriate.

(b) **Rights and Remedies are Cumulative.** Except as otherwise expressly stated in this Agreement, the rights and remedies of the Parties are cumulative, and the exercise by any Party of one or more of its rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party.

(c) **Specific Performance as Exclusive Remedy.** Subject to the Parties right to terminate this Agreement in accordance with Section 4 above, the Parties exclusive remedy for an uncured breach of this Agreement is to institute an action for specific performance of the terms of this Agreement, and in no event shall the Parties have the right, and the Parties expressly waive the right to, seek monetary damages of any kind (including but not limited to actual damages, economic damages, consequential damages, or lost profits) in the event of a default by the Parties under this Agreement or any action related to this Agreement.

(d) Indemnity. Each Party hereto (an "Indemnifying Party") shall indemnify, protect, defend, and hold harmless the other Party to this Agreement and its officials, officers, directors, employees, representatives, and agents (collectively, "Indemnified Parties") from and against any and all challenges to this Agreement by the Indemnifying Party or by any third party claiming through the actions of the Indemnifying Party, and any and all losses, liabilities, damages, claims or costs (including reasonable attorneys' fees) (collectively, the "Losses") arising from the negligent acts, errors, or omissions and willful misconduct with respect of the obligations of the Indemnifying Party, its officers, employees, representatives, members, and agents hereunder or the Project, excluding any such Losses arising from the negligent acts, errors, or omissions and willful misconduct of the Indemnified Party. This indemnity obligation in connection with events occurring prior to the termination of this Agreement shall survive the termination of this Agreement.

(e) Notices, Demands, and Communications Between the Parties. All notices, demands, and communications between the Parties under this Agreement shall be given either by (i) personal service, (ii) delivery by a reputable document delivery service such as Federal Express that provides a receipt showing date and time of delivery, (iii) facsimile or email with a hard copy sent by United States mail; or (iv) by mailing in the United States mail, certified mail, postage prepaid, return receipt requested, addressed to:

City: City Manager
City of Peoria
8401 W. Monroe Street
Peoria, Arizona 85345

With copy to: Scott Whyte, Economic Development Services
Director
City of Peoria
9875 N. 85th Avenue
Peoria, Arizona 85345
scott.whyte@peoriaaz.gov

With copy to: Stephen M. Kemp, City Attorney
City of Peoria
8401 W. Monroe Street
Peoria, Arizona 85345
steve.kemp@peoriaaz.gov

Osage West: Mike Oliver
CEO
Osage West, LLC
8331 W. Briles Road
Peoria, AZ 85383
michaeloliver@hotmail.com

With copy to: Kirk A. Cullimore, Jr.
Red Eagle Feather
115 South Peters
Norman, Oklahoma 73069
kirk@redeaglefeather.com

Notices personally delivered, sent by fax or email with a confirmation by United States mail or delivered by document delivery service shall be deemed effective on the second business day following deposit in the United States mail. Such written notices, demands, and communications shall be sent in the same manner to such other addresses as any Party may from time to time designate by mail.

(f) **Nonliability of Officials and Employees.** No elected official, director, officer, or employee of the City or Osage West shall be personally liable under this Agreement in the event of any default or breach by a defaulting Party or for any amount, which may become due to the non-defaulting Party or on any obligations under the terms of this Agreement.

(g) **Interpretation.** The terms of this Agreement shall be construed in accordance with the meaning of the language used and shall not be construed for or against any Party by reason of the authorship of this Agreement or any other rule of construction which might otherwise apply. The part and paragraph headings used in this Agreement are for purposes of convenience only, and shall not be construed to limit or extend the meaning of this Agreement.

(h) **Entire Agreement, Waivers, and Amendments.** This Agreement and the Non-Disclosure Agreement integrate all of the terms and conditions mentioned herein, or incidental hereto, and supersede all negotiations or previous agreements between the Parties with respect to all or any part of the subject matter hereof. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the Party to be charged, and all amendments and modifications hereto must be in writing and signed by the appropriate authorities of the City and Osage West.

(i) **Counterparts; Signatures.** This Agreement may be executed in counterparts, each of which, after both Parties hereto have signed this Agreement, shall be deemed to be an original, and such counterparts shall constitute one and the same instrument. Facsimile or electronically scanned signatures shall have the same force and effect as original signatures.

(j) **Successors.** This Agreement shall be binding upon and shall inure to the benefit of the permitted successors of each of the Parties hereto.

(k) **Severability.** In the event any section or portion of this Agreement shall be held, found, or determined to be unenforceable or invalid for any reason whatsoever, the remaining provisions shall remain in effect, and the Parties hereto shall take further actions as may be reasonably necessary and available to them to effectuate the intent of the Parties as to all provisions set forth in this Agreement.

(l) **Time is of the Essence.** Time is of the essence for each of the Parties' obligations under this Agreement.

(m) **Recitals.** The recitals set forth above are incorporated herein by this reference.

(n) **Attorneys' Fees.** The prevailing Party in any action to enforce this Agreement shall be entitled to recover reasonable attorneys' fees and costs from the other Party (including fees and costs in any subsequent action or proceeding to enforce any judgment entered pursuant to an action on this Agreement).

(o) **No Third Party Beneficiaries.** This Agreement is made and entered into solely for the benefit of the City and Osage West. No other person shall have any right of action or claim under or by reason of this Agreement.

(p) **No Partnership or Joint Venture.** Nothing in this Agreement is intended to or does establish the Parties as partners, joint venturers, or principal and agent with each other.

[Signatures on Following Page]

IN WITNESS WHEREOF, the City and Osage West have signed this Agreement on the respective dates set forth above.

CITY OF PEORIA, ARIZONA, an Arizona
charter municipal corporation

By: _____
Carl Swenson, City Manager

ATTEST:

Wanda Nelson, City Clerk

APPROVED AS TO FORM:

Stephen M. Kemp, City Attorney

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing Agreement was acknowledged before me this _____ day of _____ 2011, by Carl Swenson, City Manager for the City of Peoria, Arizona, an Arizona charter municipal corporation.

Notary Public

My Commission Expires:

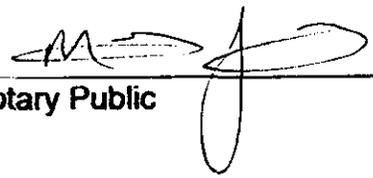
Osage West, LLC, an Arizona limited liability company



Michael Oliver, CEO/Principal

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

The foregoing Agreement was acknowledged before me this 6th day of January 2011, by Michael Oliver, CEO/Principal of Osage West, LLC, an Arizona limited liability company, for and on behalf of Osage West, LLC.



Notary Public

My Commission Expires: 7/5/13

