



## **OFFICE OF THE CITY ATTORNEY**

### **MEMORANDUM**

**TO:** Mayor and City Council Representatives

**FROM:** Sylvia Borunda Firth, City Attorney

**SUBJECT:** February 3, 2015-Agenda Item 6.2  
MCA Agreement-3rd Amendment and Subordinated Lien Agreement

**DATE:** January 29, 2015

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In order for the MCA entities to secure the financing to construct the Cardwell Collaborative it was necessary for us to amend the MCA Program Grant Agreement to provide that in the event of default by MCA either under the loan agreement or the Grant Agreement the City would divert the Impact Fund dollars to pay the bank. In order to secure the City's interests the bank agreed to allow the City a subordinate lien position, second only to the bank.

We are requesting that you approve a resolution authorizing the City Manager to sign the Third Amendment to the Program Grant Agreement and the Subordinated Lien Agreement as well as any other documents approved by the City Attorney necessary and proper to create the subordinated lien.

**Cc:** City Clerk

## RESOLUTION

### BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the City Manager be authorized to sign the Third Amendment to the Economic Development Program Grant Agreement by and between the City of El Paso and the Medical Center of the Americas Foundation; and a Subordinated Lien Agreement by and between the City of El Paso, Citizens Bank of Las Cruces, MCA Tech Park, Inc., Medical Center of the Americas Holding, Inc. and Medical Center of the Americas Foundation and any other documents approved by the City Attorney necessary and proper to create a valid second lien interest against the Cardwell Collaborative to secure the City's interests.

APPROVED this \_\_\_\_ day of February 2015.

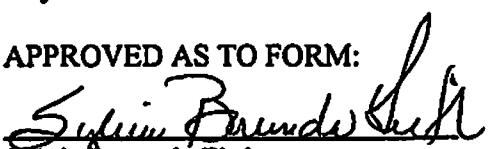
CITY OF EL PASO

\_\_\_\_\_  
Oscar Leaser  
Mayor

ATTEST:

\_\_\_\_\_  
Richarda Duffy Momsen  
City Clerk

APPROVED AS TO FORM:

  
Sylvia Borunda Firth  
City Attorney

**STATE OF TEXAS            )     **THIRD AMENDMENT TO THE ECONOMIC****  
                                      )     **DEVELOPMENT PROGRAM GRANT**  
                                      )     **AGREEMENT OF THE CITY OF EL PASO**  
**COUNTY OF EL PASO    )     (Medical Center of the Americas-Impact Fund Project)**

This Third Amendment (the "Third Amendment") to the Economic Development Program Grant Agreement dated February 7, 2012 (the "Grant Agreement"), as amended on July 31, 2012 (the "First Amendment"), and subsequently amended on November 12, 2014 (the "Second Amendment") is made and entered into by and between the **CITY OF EL PASO**, A Texas home rule municipal corporation (the "City"), and the **MEDICAL CENTER OF THE AMERICAS FOUNDATION**, a Texas non-profit corporation (the "Applicant"), pursuant to Article III, Section 52-a of the Texas Constitution and Chapter 380 of the Texas Local Government Code, for the purposes and considerations stated below.

**RECITALS:**

**WHEREAS**, in order to facilitate the financing of the construction of the Cardwell Collaborative, the proposed lender has requested the City amend the Grant Agreement to provide the Impact Funds will be paid directly to the lender to satisfy the debt if the Applicant defaults on obligations under the Grant Agreement or the loan payments;

**WHEREAS**, the City is willing to amend the Grant Agreement if the City is provided with a second lien to protect the City's interests in the event a default under the Grant Agreement or loan occurs and it is necessary for the City to direct Impact Funds to satisfy the debt;

**WHEREAS**, the proposed lender is willing to approve a subordinated lien position to secure the Applicant's obligation under the Grant Agreement, as amended;

**WHEREAS**, the Applicant has agreed to amend the Agreement to specify that Impact Funds will be directed to pay the proposed Construction Loan and Permanent Loan in the event of default under either the Grant Agreement or Loan; and

**WHEREAS**, the Applicant further agrees that in the event it becomes necessary for the City to assume the debt and pay the Construction Loan or Permanent Loan, it shall be an additional event of default under the Program Grant Agreement.

**NOW, THEREFORE**, in consideration of the mutual benefits and promises contained herein and for other good and valuable consideration, the receipts and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. **Definitions:** Capitalized terms used in this Third Amendment and not otherwise defined shall have the same meaning to such terms in the Program Grant Agreement as amended, or, if not defined in the Program Grant Agreement, the meaning specified below:

- A. **“Borrower”:** MCA Tech Park, Inc.
- B. **“Lender”:** Citizens Bank of Las Cruces  
P.O. Box 2108  
Las Cruces, NM 88004
- C. **“Construction Loan”:** Construction Term Loan from Bank to Borrower in the original principal amount of \$18,600,000.00 at an interest rate equal to Wall Street Journal Rate + 1.00% floating daily with a floor of 4.25% and a ceiling of 20.00% for a term of twenty-seven (27) months (15 months construction + 12 months stabilization), interest only with principal balance to be converted to a Permanent Loan.
- D. **“Permanent Loan”:** Term Loan from Bank to Borrower in the original principal amount of \$18,600,000.00 at an interest rate fixed for seven (7) years with 180 month maturity based upon a 300 month amortization (25 years). Principal and interest payments are estimated to be \$113,750.00 per month.
- E. **“Collateral”:** All assets and property real, personal, movable or affixed comprising the building known as the Cardwell Collaborate located on the property commonly known as 1000 MCA Tech Park Way, El Paso, Texas and more fully described in Exhibit “A” attached hereto and incorporated herein by reference secured by a Deed of Trust of even date with this Agreement in favor of the City of El Paso, a Texas municipal corporation.

2. Section 9 of the Program Grant Agreement is hereby amended to add a new Section 9 D.(3) as follows:

“If Borrower (i) fails to make timely payments to Lender in connection with the Construction Loan or Permanent Loan (for any reason other than an Event of Nonappropriation), or (ii) otherwise defaults on the Grant Agreement, and as a result of the events in (i) or (ii) the City exercises its rights under the Subordinate Lien Agreement. “

3. Upon termination of the Grant Agreement, all payments of Impact Funds to Applicant shall cease. The City will cure any of Borrower’s payment defaults under the Construction Loan or Permanent Loan and will continue to make payments to the Lender

as required by the Construction Loan or Permanent Loan until all sums owing to Lender have been paid in full.

4 Except as expressly modified herein, all other terms and conditions of the Grant Agreement effective February 7, 2012, as amended by the First Amendment dated July 31, 2012, and subsequently amended by that Second Amendment dated November 12, 2014 are acknowledged to be in full force and effect and shall remain as written.

IN WITNESS WHEREOF, the parties have executed this Agreement on this \_\_\_\_ day of \_\_\_\_\_, 2015.

**CITY OF EL PASO, TEXAS**

\_\_\_\_\_  
Tomás González  
City Manager

**APPROVED AS TO FORM:**

\_\_\_\_\_  
Sylvia Borunda Firth  
City Attorney

**APPROVED AS TO CONTENT:**

\_\_\_\_\_  
Cary Westin, Director  
Economic and International Development

**ACKNOWLEDGMENT**

STATE OF TEXAS       §  
                                  §  
COUNTY OF EL PASO   §

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 2015, by Tomás González, as City Manager of the City of El Paso, Texas (CITY).

\_\_\_\_\_  
Notary Public, State of Texas

My Commission Expires:

\_\_\_\_\_

[SIGNATURES CONTINUE ON FOLLOWING PAGE]

**APPLICANT: MEDICAL CENTER  
OF THE AMERICAS FOUNDATION**

\_\_\_\_\_  
Name: Emma W. Schwartz

Title: President

\_\_\_\_\_  
Name: Edward Escudero

Title: Chairman of the Board

**ACKNOWLEDGMENT**

STATE OF \_\_\_\_\_ §

§

COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 2015,  
by Emma E. Schwartz, as President of the **Medical Center of the Americas Foundation**  
(APPLICANT).

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_

My Commission Expires:

\_\_\_\_\_

**ACKNOWLEDGMENT**

STATE OF \_\_\_\_\_ §

§

COUNTY OF \_\_\_\_\_ §

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 2015,  
by Edward Escudero, as Chairman of the Board of the **Medical Center of the Americas  
Foundation** (APPLICANT).

\_\_\_\_\_  
Notary Public, State of \_\_\_\_\_

My Commission Expires:

\_\_\_\_\_

STATE OF TEXAS           )  
                                      )  
COUNTY OF EL PASO    )     **SUBORDINATED LIEN AGREEMENT**

This Subordinated Lien Agreement is made and entered into by and between the City of El Paso, a Texas home rule municipal corporation, Citizens Bank of Las Cruces, MCA Tech Park, Inc., MC Americas Holdings, Inc. and Medical Center of the Americas Foundation.

**WHEREAS**, pursuant to Chapter 380 of the Texas Government Code, the City of El Paso is authorized to grant and loan municipal funds for the purposes of promoting economic development and stimulating business and commercial activity within the City of El Paso;

**WHEREAS**, on June 14, 2011, the City of El Paso adopted a Chapter 380 Economic Development Program by creating the City of El Paso Economic Development Incentive Policy Impact Fund ("Impact Fund") for the purpose of undertaking an economic development project consisting of biomedical cluster specific programs and infrastructure;

**WHEREAS**, on February 7, 2012, the City of El Paso entered into an Economic Development Program Grant Agreement ("Grant Agreement") with Medical Center of the Americas Foundation to provide funding for various economic development activities in the City of El Paso, including the construction of a building to be used as an anchor in the MCA Research Park;

**WHEREAS**, on July 31, 2012 the City of El Paso entered into a First Amendment to Economic Development Program Grant Agreement with the Medical Center of the Americas Foundation to designate \$11,016,000.00 in funding and assurances with regard to the construction of the TTUHSC Gayle Grieve Hunt School of Nursing;

**WHEREAS**, on November 12, 2014, the City of El Paso entered into a Second Amendment to Economic Development Program Grant Agreement for the purposes of amending provisions regarding the City Use of Building components of the Program Grant Agreement, waiving construction fees in an amount not to exceed \$370,000.00 to facilitate the construction of the Cardwell Collaborative, and adjusting the Grant Agreement to reflect the fact that Medical Center of the Americas and its affiliates would own the real estate rather than leasing it from the City of El Paso;

**WHEREAS**, on November 20, 2014, the City of El Paso transferred title to real estate within the MCA Area to MCA Tech Park, Inc. to provide the site necessary for the establishment of the Cardwell Collaborative and to MCA Revere Realty, Inc. for the projects specified in the Grant Agreement;

**WHEREAS, MCA Tech Park, Inc. desires to borrow the funds necessary to construct the Cardwell Collaborative from Citizens Bank of Las Cruces;**

**WHEREAS, Citizens Bank of Las Cruces has requested the Grant Agreement be amended to provide that Impact Funds will be used to retire the debt in the event Medical Center of the Americas defaults in its obligations to the City of El Paso under the Grant Agreement; or if MCA Tech Park, Inc. defaults in its payments to Citizens Bank of Las Cruces; and**

**WHEREAS, the City of El Paso is willing to amend the Grant Agreement as requested by Citizens Bank of Las Cruces in return for the considerations and terms contained herein.**

**NOW, THEREFORE, in consideration of the mutual benefits and promises contained herein and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:**

#### **SECTION I – Definitions**

**Capitalized terms used in this Subordinated Lien Agreement and not otherwise defined shall have the meaning specified below:**

- 1. “Agreement”: This Subordinated Lien Agreement, together with all exhibits, schedules and amendments.**
- 2. “Grant Agreement”: The Economic Development Program Grant Agreement entered into by the City of El Paso and Medical Center of the Americas Foundation on February 7, 2012, the First Amendment to the Program Grant Agreement dated July 31, 2012 and the Second Amendment to the Program Agreement dated November 12, 2014, together with all exhibits and schedules attached and subsequent amendments.**
- 3. “City”: City of El Paso, Texas, a Texas municipal corporation.**
- 4. “Lender”: Citizens Bank of Las Cruces  
P.O. Box 2108  
Las Cruces, NM 88004**
- 5. “Borrower”: MCA Tech Park, Inc.**
- 6. “Guarantor No. 1”: MC Americas Holdings, Inc.**
- 7. “Guarantor No. 2”: Medical Center of the Americas Foundation**
- 8. “MCA Area”: An area within the City of El Paso encompassing 440 acres, located south of Interstate 10, North and West of Paisano Drive, and East of Boone Street and currently**



anchored by the University Medical Center of El Paso and the Texas Tech University Health Sciences Center Paul L. Foster School of Medicine.

9. **"Collateral"**: All assets and property real, personal, movable or affixed, comprising the building known as the Cardwell Collaborative located on the property commonly known as 1000 MCA Tech Park Way, El Paso, Texas and more fully described in Exhibit "A" attached hereto and incorporated herein by reference, secured by a subordinate Deed of Trust of even date with this Agreement in favor of the City of El Paso, a Texas municipal corporation.

10. **"Grantor"**: MCA Tech Park, Inc.

11. **"Effective Date"**: The date upon which all parties have fully executed this Agreement as set forth on the signature page.

12. **"Construction Loan"**: Construction Term Loan from Bank to Borrower in the original principal amount of \$18,600,000.00 at an interest rate equal to Wall Street Journal Rate + 1.00% floating daily with a floor of 4.25% and a ceiling of 20.00% for a term of twenty-seven (27) months (15 months construction + 12 months stabilization), interest only with principal balance to be converted to a Permanent Loan.

13. **"Permanent Loan"**: Term Loan from Bank to Borrower in the original principal amount of \$18,600,000.00 at an interest rate fixed for seven (7) years with 180 month maturity based upon a 300 month amortization (25 years). Principal and interest payments are estimated to be \$113,750.00 per month.

## **SECTION II – TERM**

The Term of this Agreement shall be from the Effective Date until payment in full of the Construction Loan and Permanent Loan and the release of the Deed of Trust signed to secure the second lien position held by the City.

## **SECTION III – GRANT OF LIEN**

By signing this Agreement the parties attest to the fact a deed of trust lien has been created in favor of the City to secure the terms of this Agreement and the Grant Agreement, as amended. The lien shall be subordinate only to the lien created to secure the Construction Loan and Permanent Loan and other matters of record. Simultaneously with the execution of this Agreement, Grantor will execute and deliver a Deed of Trust in form and substance approved by the City Attorney to secure the obligations of Grantor and both will be recorded in the Real Property Records of El Paso County, Texas.

#### **SECTION IV – DEFAULT OF LOAN PAYMENTS**

Lender shall provide the City with a duplicate notice of default when one is sent to the Borrower and Guarantor No. 1 and Guarantor No. 2 in connection with the Construction Loan or the Permanent Loan. In the event the Borrower fails to cure the default, Lender shall notify the City and the City shall be afforded one hundred twenty (120) days from the date the written notice is received by the City to cure the default. Lender agrees that it will accept payments directly from the City and the actions of the City to collect from Borrower or to foreclose its subordinate lien shall not be an event of default under the Construction Loan or the Permanent Loan. The intent of the parties being that the City be allowed to assume the role of the Borrower and satisfy the indebtedness in the event of default. The City agrees with Lender that in the event of an uncured default by Borrower under the Construction Loan or Permanent Loan, the City will redirect funding from the Impact fund that is necessary to pay monetary obligations under the Construction Loan or Permanent Loan.

#### **SECTION V – AMENDMENT TO GRANT AGREEMENT**

Medical Center of the Americas Foundation will execute and deliver the Third Amendment to Economic Development Program Grant Agreement prior to closing on the loan with Citizens Bank of Las Cruces.

#### **SECTION VI – DEFAULT UNDER GRANT AGREEMENT**

In the event that Guarantor No. 2 or any of its affiliates defaults in its obligations to the City under the Grant Agreement and City terminates the Program Grant Agreement, the City will redirect Impact Fund dollars directly to Lender in return for the Lender's agreement to allow the City to assume the Borrower's obligations under the Construction Loan or the Permanent Loan, foreclose its Deed of Trust Lien or, at the option of the City, pay off the Lender's loan without prepayment penalty(but accrued, unpaid interest will be paid). In the event the City elects to pay off the outstanding balance due to Lender, City may request an assignment of Lender's first lien position.

#### **SECTION VII - ANNUAL APPROPRIATIONS**

The parties to this Agreement acknowledge the City's obligations under the Grant Agreement and this Agreement are subject to annual appropriations by the City of El Paso.

## **SECTION VIII – GENERAL PROVISIONS**

1. **Governing Law.** This Agreement shall be governed by and enforced in accordance with the laws of the State of Texas and venue shall lie in El Paso County, Texas.
2. **City's Exercise of Rights and Remedies.** This Agreement shall not prevent the City from exercising its rights under the Deed of Trust securing same, provided that the exercise of any such remedies will be subordinated and made inferior to the rights, remedies and lien in favor of Lender securing the hereinabove described loan.
3. **Notice of Default.** Neither the City nor Lender shall complete a non-judicial foreclosure or foreclosure sale of the Collateral or recordation of a deed in lieu of foreclosure with respect to the Collateral unless and until the City or the Lender, as the case may be, has first been given sixty (60) days written notice of the default(s) or event(s) of default, giving rise to the City's or the Lender's right to complete such foreclosure remedies, and the City or the Lender having failed, within such sixty (60) day period to cure such default(s) or event(s) of default; provided, however, that the City or the Lender, as the case may be, shall be entitled during such sixty (60) day period to continue to pursue all of its rights and remedies under the respective loan documents and Program Grant Agreement, except completion of the foreclosure remedies. The City and the Lender shall give the notice at the address set forth below or such other address as each may instruct to the other in writing from time to time.
4. **Notices.** Any Notices required by this Agreement shall be sufficient if sent by certified mail, return receipt requested, to the parties as follows:

**CITY OF EL PASO:** City of El Paso  
Director  
Economic Development  
P.O. Box 1890  
El Paso, Texas 79950-1890

**Copy to:** City of El Paso  
P.O. Box 1890  
El Paso, Texas 79950-1890  
Attention: City Attorney

**Lender:** Citizens Bank of Las Cruces  
P.O. Box 2108  
Las Cruces, NM 88004

**Borrower:** MCA Tech Park, Inc.  
201 E. Main, Ste. 1514  
El Paso, Texas 79901

**Guarantor No. 1:** MC Americas Holdings, Inc.  
201 E. Main, Ste. 1514  
El Paso, Texas 79901

**Guarantor No. 2:** Medical Center of the Americas Foundation  
201 E. Main, Ste. 1514  
El Paso, Texas 79901

Notice of change of address must be given in writing in the same manner as other notices are given pursuant to this section.

5. **Amendments.** Unless otherwise provided herein, this Agreement may be amended only by written instrument signed by the parties.
6. **Successors and Assigns.** This Agreement is binding on and inures to the benefit of the legal representatives, successors, and assigns of the parties.
7. **Severability.** Every provision of this Agreement is severable, and if any term or provision hereof is illegal or invalid for any reason whatsoever, such illegality or invalidity shall not affect the validity of the remainder of this Agreement.
8. **Counterparts.** This Agreement may be executed in one or more counterparts; signature pages may be detached from such separately executed counterparts and reattached to other counterparts, each of which counterparts when executed and delivered shall be an original and all of which shall together constitute one and the same instrument.
9. **Further Assurances.** The parties hereto agree to execute and deliver such other additional documents and instruments as may be reasonably necessary or proper in order to fully effect the terms, provisions and intentions expressed in this Agreement.
10. **Captions.** The captions to the various paragraphs of this Agreement are for reference purposes only and shall not in any way control the meaning or interpretation of this Agreement.
11. **Entire Agreement.** This Agreement constitutes the entire agreement between the parties hereto relating to the Agreement. There exists no other written or oral understanding, agreements or assurances with respect to such matters except as are set forth herein.

{SIGNATURES BEGIN ON THE FOLLOWING PAGE}

APPROVED this \_\_\_\_ day of \_\_\_\_\_, 2015.

CITY OF EL PASO, TEXAS

\_\_\_\_\_  
Tomás González  
City Manager

APPROVED AS TO FORM:

APPROVED AS TO CONTENT:

\_\_\_\_\_  
Sylvia Borunda Firth  
City Attorney

\_\_\_\_\_  
Cary Westin, Director  
Economic and International Development

ACKNOWLEDGMENT

STATE OF TEXAS       §  
                                  §  
COUNTY OF EL PASO   §

This instrument was acknowledged before me on the \_\_\_\_ day of \_\_\_\_\_, 2015,  
by Tomás González, as City Manager of the City of El Paso, Texas.

\_\_\_\_\_  
Notary Public, State of Texas

My Commission Expires:

\_\_\_\_\_

[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]

**BORROWER: MCA Tech Park, Inc.**

\_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**ACKNOWLEDGMENT  
BORROWER**

STATE OF \_\_\_\_\_ )  
 )  
COUNTY OF \_\_\_\_\_ )

This instrument was acknowledged before me on the \_\_\_\_\_ day of \_\_\_\_\_,  
2015, by \_\_\_\_\_ as \_\_\_\_\_ of MCA Tech Park,  
Inc.

\_\_\_\_\_  
NOTARY PUBLIC IN AND FOR  
THE STATE OF TEXAS

\_\_\_\_\_  
Name Printed \_\_\_\_\_

Notary's Commission expires:  
\_\_\_\_\_

**[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]**

**GUARANTOR NO. 1:  
MC AMERICAS HOLDINGS, INC.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**ACKNOWLEDGMENT  
GUARANTOR NO. 1**

**STATE OF TEXAS       §**

**§**

**COUNTY OF EL PASO   §**

      This instrument was executed before me on the \_\_\_\_ day of \_\_\_\_\_, 2015, by  
\_\_\_\_\_, as \_\_\_\_\_ of MC Americas Holdings, Inc.

\_\_\_\_\_  
Notary Public, State of Texas

My Commission Expires:

\_\_\_\_\_

**[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]**

**GUARANTOR NO. 2:  
MEDICAL CENTER OF THE  
AMERICAS FOUNDATION**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**ACKNOWLEDGMENT  
GUARANTOR NO. 2**

**STATE OF TEXAS**

§  
§  
§

**COUNTY OF EL PASO**

This instrument was executed before me on the \_\_\_\_ day of \_\_\_\_\_, 2015, by  
\_\_\_\_\_, as \_\_\_\_\_ of Medical Center of the Americas Foundation.

\_\_\_\_\_  
Notary Public, State of Texas

My Commission Expires:

\_\_\_\_\_

[SIGNATURES CONTINUE ON THE FOLLOWING PAGE]



**LENDER:**  
**CITIZENS BANK OF LAS CRUCES**

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**ACKNOWLEDGMENT**  
**LENDER**

**STATE OF** \_\_\_\_\_ )  
 )  
**COUNTY OF** \_\_\_\_\_ )

This instrument was acknowledged before me on the \_\_\_\_\_ day of \_\_\_\_\_,  
2015, by \_\_\_\_\_ of Citizens  
Bank of Las Cruces, on behalf of said Bank.

\_\_\_\_\_  
**NOTARY PUBLIC IN AND FOR**  
**THE STATE OF** \_\_\_\_\_

\_\_\_\_\_  
**Name Printed**

**Notary's Commission expires:**

\_\_\_\_\_

**AFTER RECORDING RETURN TO:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_