

**CITY OF EL PASO, TEXAS
AGENDA ITEM DEPARTMENT HEAD'S SUMMARY FORM**

DEPARTMENT: Economic and International Development

AGENDA DATE: First Reading: October 30, 2018
Public Hearing: November 13, 2018

CONTACT PERSON: Elizabeth K. Triggs, (915) 212-1619
TriggsEK@elpasotexas.gov

DISTRICT(S) AFFECTED: 1 and 4

SUBJECT:

An ordinance authorizing the City Manager to sign a land exchange agreement, deed and any other documents necessary to convey to FSW Investments, LP, approximately 2,313 acres situated in multiple portions of the Texas and Pacific Railroad Company Surveys in the Northeast section of the City of El Paso in exchange for land owned by FSW Investments, LP and located in the Northwest section of the City of El Paso.

BACKGROUND/DISCUSSION:

This ordinance authorizes a land exchange between the City and FSW for the exchange of approximately 2,313 acre parcel of land owned by the City and located in Tax Increment Reinvestment Zone No. Thirteen in the Northeast part of the City of El Paso for property owned by FSW, Investments, LP, located in the Northwest part of the City of El Paso. The exchange is authorized by Section 272.001(b)(6) of the Texas Local Government Code and Section 311.008(b)(2) of the Texas Tax Code which allow for the exchange of real property for fair market value in the furtherance of adopted tax increment reinvestment project plans.

The purpose of the land exchange is to allow for the development of a mixed use community in the Northeast and the funding of the future Sean Haggerty extension to improve the security and access of existing isolated communities in the area, in accordance with the adopted TIRZ 13 Project and Finance Plan, while also promoting the development of the Northwest property as the future site of a resort hotel and water park, known as Great Wolf Lodge. The value of each property being exchanged is \$18.6M and closing is contingent on completion of a due diligence period by both Parties and the entrance into a development agreement that is mutually agreeable to both parties.

PRIOR COUNCIL ACTION:

On October 2, 2018, the El Paso City Council created Tax Increment Reinvestment Zone No. 13 for the purpose of improving safety and access in the area, while also promoting mixed-use development. On October 30, 2018, the El Paso City Council will consider adoption the Final Project and Finance Plan governing projects and funding in TIRZ 13 and will additionally consider approval of a Memorandum of Understanding with the EPWater Utilities to transfer 2,313 acres of land from the EPWater land inventory to the City inventory, as well as a Chapter 380 Economic Development Agreement and Ground Lease for the development of a Great Wolf Lodge on the site currently owned by FSW.

AMOUNT AND SOURCE OF FUNDING:

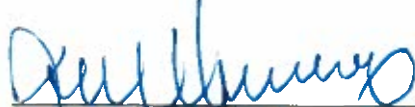
City-owned property appraised at \$18.6M is being exchanged for a privately-owned parcel of property.

BOARD/COMMISSION ACTION:

N/A

*******REQUIRED AUTHORIZATION*******

DEPARTMENT HEAD:



Jessica Herrera, Director
Economic & International Development

ORDINANCE NO. _____

AN ORDINANCE AUTHORIZING THE CITY MANAGER TO SIGN A LAND EXCHANGE AGREEMENT, DEED AND ANY OTHER DOCUMENTS NECESSARY TO CONVEY TO FSW INVESTMENTS, LP, APPROXIMATELY 2,313 ACRES SITUATED IN MULTIPLE PORTIONS OF THE TEXAS AND PACIFIC RAILROAD COMPANY SURVEYS IN THE NORTHEAST SECTION OF THE CITY OF EL PASO IN EXCHANGE FOR LAND OWNED BY FSW INVESTMENTS, LP AND LOCATED IN THE NORTHWEST SECTION OF THE CITY OF EL PASO.

WHEREAS, the City of El Paso ("City") owns approximately 2,313 acres of land in the Northeast section of the City of El Paso, situated in a portion of the following sections of the Texas and Pacific Railroad Company Surveys:

Area 1 (1,501.648 acres): A portion of Sections 9, 10, 15, 16, 17 & 18, Block 81, Township 1, Texas & Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas;

Area 2 (650.600 acres): A Portion of Sections 11, 14 & 19, Block 81, Township 1, Texas & Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas;

Area 3 (2,045.343 acres): A portion of Sections 11, 12, 13, 14, 19, 20 and 21, Block 81, Township 1, Texas and Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas; and

Area 4 (1,003.107 acres): A portion of Sections 7, 17, 18, 19, 20 and 30, Block 80, Township 1, Texas and Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas; and

WHEREAS, the approximately 2,313 acre parcel was acquired by the City from the El Paso Water Utilities – Public Service Board ("EPWU-PSB") pursuant to a Memorandum of Understanding (Northeast Land Transfer) approved by the City and EPWU-PSB on October 30, 2018; and

WHEREAS, the parties entered into the Memorandum of Understanding (Northeast Land Transfer) in accordance with the 2010 Joint Resolution setting forth the policies, procedures and reimbursements related to transfer of real estate, land use policies, relocation of EPWater Facilities, joint use and water rights which was amended in 2012 and 2017); and

WHEREAS, the approximately 2,313 acre parcel of land is located in Tax Increment Reinvestment Zone Number Thirteen, City of El Paso, Texas ("TIRZ 13"); and

WHEREAS, the City wishes to exchange the approximately 2,313 acre parcel of land for property owned by FSW, Investments, LP, located in the Northwest part of the City of El Paso in Tax Increment Reinvestment Zone Number Ten, City of El Paso, Texas ("TIRZ 10"); valued at the same amount as the 2,313 acre parcel; and more particularly described in the attached Exhibit D; and

WHEREAS, Section 272.001(b) (6) of the Texas Local Government Code provides that a municipal corporation may exchange real property for fair market value without giving notice and requesting sealed bids; and

WHEREAS, Section 311.008 (b) (2), of the Texas Tax Code permits a municipality to sell property on the terms and conditions and in the manner it considers advisable to implement tax increment reinvestment zone project plans; and

WHEREAS, the El Paso City Council finds that it is in the public interest to exchange the identified property for property owned by FSW Investments, LP, located in the Northwest part of the City of El Paso.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO, TEXAS;

That the City Manager is authorized to sign a land exchange agreement, deed, and any other necessary documents, in a form approved by the City Attorney's Office, conveying to FSW Investments, LP approximately 2,313 acres situated in a portion of the following sections of the Texas and Pacific Railroad Company Surveys:

Area 1 (1,501.648 acres): A portion of Sections 9, 10, 15, 16, 17 & 18, Block 81, Township 1, Texas & Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas;

Area 2 (650.600 acres): A Portion of Sections 11, 14 & 19, Block 81, Township 1, Texas & Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas;

Area 3 (2,045.343 acres): A portion of Sections 11, 12, 13, 14, 19, 20 and 21, Block 81, Township 1, Texas and Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas; and

Area 4 (1,003.107 acres): A portion of Sections 7, 17, 18, 19, 20 and 30, Block 80, Township 1, Texas and Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas.

PASSED AND APPROVED this ____ day of _____, 2018.

CITY OF EL PASO

Dee Margo
Mayor


Signatures continue on following page.

CITY CLERK DEPT.
2018 OCT 25 AM 10:27

ATTEST:

Laura D. Prine
City Clerk

APPROVED AS TO FORM:



Roberta Brito
Assistant City Attorney

APPROVED AS TO CONTENT:



Jessica Herrera, Director
Economic & Int'l Development

13.1

:

STATE OF TEXAS §
 § LAND EXCHANGE AGREEMENT
COUNTY OF EL PASO §

This Land Exchange Agreement (“**Agreement**”) is entered into this 30th day of October 2018, by and between the **CITY OF EL PASO, TEXAS** (the “**City**”) and FSW Investments, LP (“**FSW**”). The “**Effective Date**” of this Agreement shall be the later of (i) date of City Council approval of an Ordinance authorizing the land exchange pursuant to the terms of this Agreement; or (ii) the date that the fully executed Agreement is deposited with the Title Company.

RECITALS

1. The City is the owner of approximately 2,313 acres of real property generally located on the northeast part of the City of El Paso (the “**NE Property**”).
2. On October 2, 2018, the City Council adopted Ordinance No. 018849, establishing Tax Increment Financing Reinvestment Zone Number Thirteen, City of El Paso, Texas (“**TIRZ 13**”), in accordance with the Tax Increment Financing Act, as amended (Chapter 311 of the Texas Tax Code, hereinafter called the “**Act**”), to promote development of the NE Property through the use of tax increment financing.
3. On October 30th, 2018 by Ordinance No. _____, the City Council adopted the Final Project Plan and Reinvestment Zone Financing Plan for TIRZ 13 (“**Project Plan**”).
4. The NE Property is located within TIRZ 13.
5. Section 272.001(b) (6) of the Texas Local Government Code provides that the City may convey, sell, or exchange the NE Property without public notice and bidding, at fair market value, as it is City-owned property located within TIRZ 13.
6. FSW is the owner of approximately 44 acres of real property located at the corner of Paseo del Norte and Desert Boulevard North (the “**Desert West Property**”).
7. Through an exchange of properties, the City desires to acquire the Desert West Property from FSW, and FSW desires acquire the NE Property from the City.

DEFINITIONS

For purposes of this Agreement, each of the following terms, when used with an initial capital letter, shall have the meaning ascribed to it in this section:

“**Affiliate**” means any person or entity that owns or controls, is owned or controlled by, or is under common ownership, partial common ownership or control with the party in question. As used in the preceding sentence, the term “**control**” (and its derivatives) shall mean the possession, directly or indirectly, of the power to direct the management and policies of an entity, whether through

voting rights, by contract or otherwise. For the purposes of this Agreement, any separate account or client for which FSW is sponsor, managing agent, asset manager or fund manager shall be deemed an "Affiliate" of FSW.

"Business Days" means Monday through Friday, excluding federal holidays on which national banking associations in El Paso, Texas are authorized to be closed.

"Closing" means the closing and simultaneous consummation of the exchange of the NE Property and Desert West Property pursuant to this Agreement.

"Closing Date" means the date upon which Closing occurs.

"Current Tax Period" means the tax year in which the Closing occurs.

"Entity" means any person, partnership, limited partnership, joint venture, corporation, limited liability company, trust, governmental authority or other entity.

"Escrow Agent" means WestStar Title, 641 N. Stanton, El Paso, Texas 79901; Travis Smith; Phone: 915-747-4147; Fax: 915-206-6550; Email: tjsmith@weststar-title.com.

"Exchange Value" means **EIGHTEEN MILLION SIX HUNDRED THOUSAND AND NO/100 DOLLARS (\$18,600,000.00).**

"FSW's Actual Knowledge" means the actual, affirmative knowledge of Brent D. Harris or William Kell, without any diligence, inquiry, investigation or imputation; provided, however, there shall be no personal liability on the part of such person(s) under this Agreement or as a result of any of the representations and warranties set forth herein.

"Hazardous Substances" means all hazardous wastes, hazardous substances, extremely hazardous substances, hazardous constituents, hazardous materials and toxic substances that are regulated under any Legal Requirements pertaining to the environment, including, but not limited to, (i) the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. § 9601 et seq., (ii) the Hazardous Materials Transportation Authorization Act of 1994, as amended, 49 U.S.C. § 5101 et seq., (iii) the Resource, Conservation and Recovery Act of 1976, as amended, 42 U.S.C. § 6901 et seq., (iv) the Clean Water Act, as amended, 33 U.S.C. § 1251 et seq., (v) the Toxic Substances Control Act of 1976, as amended, 15 U.S.C. § 2601 et seq., (vi) the Clean Air Act, as amended, 42 U.S.C. § 7401 et seq., and (vii) any so-called "superfund" or "superlien" law.

"Improvements" means buildings and improvements located on the Desert West Property or NE Property, as applicable that are attached thereto and part of the real property.

"Inspection Period" means the period commencing on the Effective Date of the Agreement and expiring on the date that is 240 days after the Effective Date.

“Legal Requirements” means all applicable governmental laws, statutes, codes, ordinances, rules, regulations, orders, judgments and decrees.

“Monetary Liens”, as to the Desert West Property means all liens, mortgages, deeds of trust, financing statements and other security interests encumbering the Desert West Property and as to the NE Property means all liens, mortgages, deeds of trust, financing statements and other security interests encumbering the NE Property. Monetary Liens shall not include the lien for unpaid Property Taxes for the Current Tax Period and subsequent years.

“Non-Permitted Liens” (i) as to the Desert West Property, means (a) all consensual liens, judgments or other encumbrances affecting the Desert West Property, (b) all Monetary Liens, (c) any mechanic’s or materialmen’s liens affecting the Desert West Property, and (d) any unpaid Property Taxes for any years prior to the year of Closing affecting the Desert West Property; (ii) as to the NE Property, means (a) all consensual liens, judgments or other encumbrances affecting the NE Property, (b) all Monetary Liens, (c) any mechanic’s or materialmen’s liens affecting the NE Property, and (d) any unpaid Property Taxes for any years prior to the year of Closing affecting the NE Property.

“Operating Agreement” means all unrecorded operating agreements related to the Desert West Property or NE Property, as applicable, including, but not limited to, management, leasing, equipment rental, supply, security, maintenance, pest control, utility and waste disposal contracts.

“Owner’s Title Policy” means a standard Form T-1 Texas Owners Policy of Title Insurance issued by Escrow Agent on behalf of Title Company, that insures FSW has good and indefeasible fee simple title in the NE Property and City has good and indefeasible fee simple title in the Desert West Property, subject to the applicable Permitted Exceptions defined below, in the amount of the applicable Exchange Valuation, and is based on the applicable Title Commitment.

“Permitted Exceptions” means: (i) Property Taxes for the Current Tax Period and subsequent years, including, but not limited to, any lien securing the payment thereof; and (ii) all other exceptions disclosed by the Title Commitment, the Title Documents or the updated surveys relating to the applicable Property and which are approved or deemed approved by FSW as to the NE Property in accordance with Article VIII hereof, but shall exclude all Non-Permitted Liens, and the City as to the Desert West Property in accordance with Article III hereof, but shall exclude all Non-Permitted Liens.

“Property” means fee simple interest in the NE Property and Desert West Property, including, but not limited to, buildings, structures, fixtures and other improvements located on said real property, but excluding any improvements owned or leased by third parties having a right to the Property pursuant to the terms of the Permitted Exceptions.

“Property Taxes” means the real property taxes, personal property taxes and assessments (general and special, public and private) levied against the NE Property and / or Desert West Property, as applicable.

“Required Closing Date” means the date which is 30 days after the end of the Inspection Period. Should the City wish to close earlier or later than the Required Closing Date, the City may request that FSW consent to an earlier or later closing date, which consent shall not be unreasonably withheld. .

“Title Commitment” means a standard Form T-7 Texas Commitment for Title Insurance issued by Escrow Agent on behalf of Title Company, relating to the issuance of the Owner’s Title Policy.

“Title Company” means WestStar Title Company, 641 N. Stanton, El Paso, Texas; Phone: 915-747-4147; Fax: 915-206-6550; Email: tjsmith@westar-title.com.

“Title Documents” means all documents referenced in the Title Commitment.

“Transaction Documents” means this Agreement and the documents executed by each party at Closing.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

ARTICLE I PROPERTY DESCRIPTIONS

1.1 The NE Property consists of approximately 2,313 acres, legally described as a portion of:

- (a) **Area 1** (1,501.648 acres): A portion of Sections 9, 10, 15, 16, 17 & 18, Block 81, Township 1, Texas & Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas;
- (b) **Area 2** (650.600 acres): A Portion of Sections 11, 14 & 19, Block 81, Township 1, Texas & Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas;
- (c) **Area 3** (2,045.343 acres): A portion of Sections 11, 12, 13, 14, 19, 20 and 21, Block 81, Township 1, Texas and Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas;
- (d) **Area 4** (1,003.107 acres): A portion of Sections 7, 17, 18, 19, 20 and 30, Block 80, Township 1, Texas and Pacific Railroad Company Surveys, City of El Paso, El Paso County, Texas; and;

The area described above shall be subject to the following additional reservations and exceptions:

- (a) Subject to and without waiver of FSW’s right to make title and survey objections as set forth in the paragraph 3.4 of the Agreement, a reservation of all valid and existing easements and mineral interests filed and recorded at the time of transfer of the identified parcels, as noted in the Title Commitment; .

- (b) Exception from transfer and conveyance all existing water infrastructure as shown on a survey to be provided to FSW within sixty (60) days of the Effective Date
- (c) Exception from transfer and conveyance all existing sewer lines and infrastructure as shown on a survey to be provided to FSW within sixty (60) days of the Effective Date;
- (d) Exception from transfer and conveyance in the amount of approximately seven (7) acres in total for a future El Paso Water Utilities Aquifer Storage Recovery ("ASR") Project to be developed by El Paso Water Utilities as shown on a survey to be provided to FSW within sixty (60) days of the Effective Date;
- (e) A reservation for El Paso Water Utilities, its successors and assigns forever all water, in and under, and that may be produced from or attributable to the above NE Property. If the water estate is subject to existing production or an existing license, this reservation includes the production, the license and all benefits from such;
- (f) At no cost to El Paso Water Utilities, FSW shall grant easements for future water, sewer and stormwater facilities as requested to El Paso Water Utilities, including lines, appurtenances, pump stations, storage facilities or channels, dams, ponds, etc., in addition to the facilities specifically identified above, that are proportionate and necessary to serve any and all of the NE Property as requested by El Paso Water Utilities in accordance with Title 19 of the City of El Paso Municipal Code; and,
- (g) Exception from transfer and conveyance any land located outside of the bounds of Tax Increment Reinvestment Zone Number Thirteen, City of El Paso, Texas as created by Ordinance No. 018849.

The above area is depicted on **Exhibit A**, attached hereto and made a part herein for all purposes. The NE Property shall be comprised of 2,313 acres of land and will be more fully described in the NE Property Survey. The appraised value of the NE Property is **EIGHTEEN MILLION SIX HUNDRED THOUSAND AND NO/100 DOLLARS (\$18,600,000.00)**.

1.2 The Desert West Property consists of 43.58 acres at 7850 Paseo Del Norte, El Paso, Texas and 6300 N. Desert Blvd., El Paso, Texas, legally described as follows:

- (a) 1 EL PASO WEST PT OF 1 BEG 18.49' N OF SWC (684.25' ON NWLY -1018.96' ON ELY-IRREG ON SLY-1075.89' ON WLY (30.26)
- (b) 1 EL PASO WEST SLY PT OF 1 (1130.63 FT ON S- IRREG ON W-IRREG ON N-678.11 FT ON E) (13.3152 AC)

The Desert West Property is depicted on **Exhibit D**, attached hereto and made a part herein for all purposes. The sales price for the Desert West Property is **EIGHTEEN MILLION SIX HUNDRED THOUSAND AND NO/100 DOLLARS (\$18,600,000.00)**.

**ARTICLE II
STATEMENT OF EXCHANGE AND
DESIGNATION OF TITLE COMPANY**

2.1 The City hereby agrees to exchange the NE Property for the Desert West Property, and FSW hereby agrees to exchange the Desert West Property for the NE Property, on the terms and conditions set forth in this Agreement. The parties agree that the FSW Property and Desert West Property are of equal value.

2.2 Upon approval of the NE Property Survey by City and FSW, this Agreement shall be amended so that **Exhibit A** to this Agreement will be replaced with the property description contained in the NE Survey.

2.3 Upon approval of the Desert West Property Survey by City and FSW, this Agreement shall be amended so that **Exhibit B** to this Agreement will be replaced with the property description contained in the Desert West Survey.

**ARTICLE III
TITLE AND SURVEY AND INSPECTION OF THE DESERT WEST PROPERTY**

3.1 **Title Commitment.** Within five (5) Business Days following the Effective Date, City agrees to order, at City's sole cost and expense, a current Title Commitment for the Desert West Property (the "**Desert West Title Commitment**"), a copy of which shall be furnished to FSW and City. The Desert West Title Commitment shall contain the express commitment of the Title Company to issue an Owner's Title Policy for the Desert West Property. The Desert West Title Commitment shall be accompanied by copies of all instruments that create or evidence title exceptions affecting the Desert West Property.

3.2 **Survey.** City may obtain an update of any existing survey or obtain a new survey at City's cost (any such updated survey or new survey being herein called the "**Desert West Survey**"). Upon approval of the Desert West Survey by City and FSW, the parties agree to use the metes and bounds description of the Desert West Property contained in the Desert West Survey, if different from that appended hereto as **Exhibits B**, for purposes of describing the Desert West Property in the special warranty deed conveying to City title to the Desert West Property.

3.3 **Review of Title Commitment and Survey.** City shall have a period of ninety (90) days following the Effective Date (the "**Title Review Period**") in which to review the Desert West Title Commitment and the Desert West Survey, if any, and give written notice to FSW specifying City's objections, if any, to the Desert West Title Commitment and / or the Desert West Survey (the "**City's Objection Letter**"). If City fails to give the City's Objection Letter to FSW prior to the expiration of the Title Review Period, then all exceptions to title shown on Schedule B, but not Non-Permitted Liens arising by, through or under FSW, on Schedule C of the Desert West Title Commitment are deemed to be Permitted Exceptions. Except as the City may direct, all Non - Permitted Liens on Schedule C arising by, through or under FSW can never be deemed to be Permitted Exceptions and City shall have no obligation to object to them. Any Non-Permitted

Liens on Schedule C arising by, through or under FSW will be removed by FSW on or before the Closing Date.

3.4 FSW's Obligation to Cure; City's Right to Terminate. If City delivers to FSW the City's Objection Letter before the end of the Title Review Period, then FSW may, but is not obligated to, within ten (10) Business Days of the date of receipt of such letter (the "**Desert West Cure Period**"), give written notice ("**FSW's Title Cure Notice**") to City of FSW's intention to satisfy the City's objections concerning Schedule B items. It is expressly understood that in no event shall FSW be obligated or required to take any action, bring any action or institute any proceeding, or to otherwise incur any costs or expenses in order to attempt to eliminate any matter contained in City's Objection Letter. If FSW fails to timely give City FSW's Title Cure Notice or if FSW fails or refuses to satisfy any or all of City's objections, including exceptions related to releases of liens shown on Schedule C, of the Title Commitment, including, but not limited to any Non-Permitted Liens, then City, as its sole and exclusive right and remedy, shall notify FSW in writing prior to expiration of the Inspection Period, that either:

- (a) City waives its right to further object to any objections it has asserted which FSW has failed or refused to satisfy in which event those objections asserted by City shall be deemed Permitted Exceptions and waived by City and the parties shall proceed to close this transaction; or
- (b) Terminate this Agreement, in which event FSW and City shall have no further obligations, one to the other, with respect to the subject matter of this Agreement except as otherwise provided herein.

Notwithstanding the foregoing, in the event City fails to deliver FSW written notice of its election under subsection (a) or (b) above, prior to 5:00 p.m. Mountain Time on the last day of the Inspection Period, then City shall be deemed to have elected to waive the objections. All objections that are waived, or deemed to be waived by City shall become Permitted Exceptions.

3.5 Additional Objections to Title and Survey. In the event any new matters affecting FSW's title appear on the Desert West Title Commitment subsequent to the Inspection Period ("**New Desert West Objection**"), City shall have the right to notify FSW of such New Desert West Objection within ten (10) days from learning of such New Desert West Objection. In the event FSW fails to cure the New Desert West Objection on or before Closing, City may either, (i) waive the New Desert West Objection and proceed to Closing subject to the New Desert West Objection as a Permitted Exception, (ii) extend the Closing for up to ten (10) days allowing additional time for FSW to cure the New Desert West Objection, reserving the right to terminate the Agreement if the New Desert West Objection is not cured within the additional ten (10) day period, or (iii) terminate the Agreement in which event FSW and City shall have no further obligations, one to the other, with respect to the subject matter of this Agreement except as otherwise provided herein.

3.6 Title Policy. At the Closing, or as soon thereafter as the Title Company can issue the same, at FSW's sole cost and expense, an Owner's Title Policy is to be furnished to City by the Title Company for the Desert West Property. The Owner's Title Policy shall be issued by the Title

Company and shall insure that City has good and indefeasible fee simple title to the Desert West Property, subject only to the Permitted Exceptions. The Title Policy shall contain no exceptions other than Permitted Exceptions and shall provide that:

- (a) The survey exception may be amended, at City's expense, to except only "shortages in area";
- (b) The exception for rights of parties in possession shall be deleted;
- (c) The tax exception shall be limited to taxes for the year of Closing and subsequent years not yet due and payable; and
- (d) Unless waived by City, all Non-Permitted Liens arising by, through or under FSW shall be released and satisfied prior to or at Closing and such items and requirements shall not be exceptions to the Owner's Title Policy.

3.7 Inspection.

- (a) From the Effective Date until termination of this Agreement, City, at City's expense, shall have the right to make such physical examinations, studies, appraisals, inspections, engineering, environmental and insurance underwriting tests and investigations (the "Inspections") of the Desert West Property as City may deem advisable. FSW shall reasonably cooperate with City in making the Desert West Property reasonably available for City's Inspections. City may also re-inspect the Desert West Property prior to Closing to verify that it has remained in similar physical shape. All inspection fees, appraisal fees, engineering fees and other costs and expenses of any kind incurred by City relating to such inspection and its other due diligence shall be at the sole cost and expense of City. City agrees to be responsible and liable for any claims or damages, including mechanic's and materialmen's liens, and reasonable attorneys' fees incurred by FSW caused or arising out of or in connection with City's Inspections of the Desert West Property. The provisions of this Section shall survive the Closing or the earlier termination of this Agreement. If City elects to terminate this Agreement in accordance with the terms hereof, City shall provide FSW with copies of all documents, tests and reports generated from City's Inspection within five (5) Business Days following the date of City's termination.
- (b) If City determines that the Desert West Property is not satisfactory for any reason or for no reason, in its sole discretion, then City may, as its sole and exclusive remedy terminate this Agreement by giving written notice to FSW on or before the last day of the Inspection Period. If City has not terminated this Agreement during the Inspection Period, then City waives its right to terminate this Agreement under this Section 3.7. If City terminates this Agreement during the Inspection Period or as otherwise allowed in this Agreement, then, in either event, thereafter FSW and City shall have no further obligations to each other with respect to the subject matter of this Agreement except as otherwise expressly provided herein.

**ARTICLE IV
REPRESENTATIONS, WARRANTIES, COVENANTS,
AND AGREEMENTS OF FSW AS TO THE DESERT WEST PROPERTY**

4.1 Representations and Warranties of FSW. FSW represents and warrants to City as of the Effective Date and as of the Closing Date as follows:

- (a) FSW has the full right, power, and authority to sell and convey to City the Desert West Property as provided in this Agreement and to carry out FSW's obligations hereunder, and all requisite action necessary to authorize FSW to enter into this Agreement and to carry out FSW's obligations hereunder has been, or on the Closing Date will have been, taken, and this Agreement constitutes a valid and binding obligation of FSW, enforceable in accordance with its terms;
- (b) On the Effective Date, and as of the date of Closing, to FSW's Actual Knowledge, there are no adverse or other parties in possession of the Desert West Property or who have any leasehold rights in the Desert West Property, except as expressly provided in the Permitted Exceptions;
- (c) There is no litigation pending against FSW or, to FSW's Actual Knowledge, threatened against FSW, affecting the Desert West Property;
- (d) To FSW's Actual Knowledge, FSW has not received written notice of any pending condemnation action other than that related to this Agreement with respect to all or any portion of the Desert West Property and there are no existing condemnation or other legal proceedings affecting the existing use of the Desert West Property by any governmental authority having jurisdiction over or affecting all or any part of the Desert West Property;
- (e) FSW is not a party to any Operating Agreement that will survive the Closing;
- (f) FSW is not a "foreign person" within the meaning of the Foreign Investment in Real Property Tax Act or the Tax Reform Act of 1986;
- (g) Except as provide in Permitted Exceptions, to FSW's Actual Knowledge, no party (other than City) has any right or option to acquire all or any part of the Desert West Property, whether subject to earnest money contract, option agreement, right of first refusal, reversionary or future interests, or right of reverter.

4.2 Agreements of FSW. FSW covenants and agrees with City as follows:

- (a) **Ownership Documents.** Within ten (10) Business Days following the Effective Date, FSW shall deliver to City the following items (the "**FSW Ownership Documents**") with respect to the Desert West Property, to the extent in the possession or under the reasonable control of FSW:

- (i) A copy of the results of all physical inspections, all soil reports, if any, prepared with respect to the Desert West Property;
- (ii) A copy of current real estate tax bills or other documentation showing the amount of current Property Taxes and the assessed value of the Desert West Property and any Improvements, if any; and
- (iii) A copy of all environmental reports, inspections or assessments, engineering reports, prior surveys, if any, of the Desert West Property and any and all letters clearing site of excessive contamination.

If FSW fails to timely deliver the FSW Ownership Documents, under no circumstances will the Inspection Period be extended and City's sole remedy will be to terminate this Agreement pursuant to Section 3.7. Except as otherwise expressly provided in this Agreement, City acknowledges and agrees that FSW has not made and is not making any representations or warranties with regard to the accuracy, completeness or validity of any of the FSW Ownership Documents and / or any other materials or information provided by FSW or its agents, and City relies on such materials at its own risk. If the parties fail to consummate the transaction described herein for any reason, City agrees to return to FSW all materials delivered by or on behalf of FSW pursuant to or in connection with this Agreement within ten (10) Business Days of such event.

4.3 "AS IS, WHERE IS" SALE. EXCEPT FOR THE REPRESENTATIONS, WARRANTIES, GUARANTEES AND ASSURANCES EXPRESSLY SET FORTH IN THE TRANSACTION DOCUMENTS, CITY ACKNOWLEDGES AND AGREES THAT FSW HAS NOT MADE, IS NOT MAKING AND SPECIFICALLY DISCLAIMS AND NEGATES ANY WARRANTIES, REPRESENTATIONS, GUARANTEES OR ASSURANCES (EXPRESS OR IMPLIED) ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, CONCERNING OR WITH RESPECT TO (I) THE EXISTENCE OF ANY HAZARDOUS SUBSTANCES ON, UNDER OR ABOUT THE DESERT WEST PROPERTY, (II) THE ENVIRONMENTAL CONDITION OF THE DESERT WEST PROPERTY, (III) THE QUALITY, NATURE, ADEQUACY OR PHYSICAL CONDITION OF THE DESERT WEST PROPERTY, (IV) THE QUALITY, NATURE, ADEQUACY OR CONDITION OF THE SOILS AND GROUNDWATER AT THE DESERT WEST PROPERTY, (V) THE EXISTENCE, QUALITY, NATURE, ADEQUACY OR CONDITION OF ANY UTILITIES AT OR NEAR THE DESERT WEST PROPERTY, (VI) THE CURRENT OR FUTURE INCOME OR EXPENSES OF THE DESERT WEST PROPERTY, (VII) THE VALUE, PROFITABILITY, HABITABILITY, SUITABILITY, MERCHANTABILITY, MARKETABILITY OR FITNESS FOR A PARTICULAR PURPOSE OF THE DESERT WEST PROPERTY, (VIII) THE ZONING OR OTHER LEGAL STATUS OF THE DESERT WEST PROPERTY, (IX) THE EXISTENCE OF ANY PENDING OR THREATENED TAKING OF ALL OR A PORTION OF THE DESERT WEST PROPERTY BY CONDEMNATION OR EMINENT DOMAIN, (X) THE DESERT WEST PROPERTY'S COMPLIANCE WITH ANY LEGAL REQUIREMENTS OR ANY COVENANT, CONDITION, RESTRICTION OR OTHER ENCUMBRANCE, (XI) THE MANNER OR QUALITY OF THE CONSTRUCTION OR MATERIALS, IF ANY, INCORPORATED INTO THE DESERT WEST PROPERTY, (XII) THE MANNER,

QUALITY, STATE OF REPAIR OR LACK OF REPAIR OF THE DESERT WEST PROPERTY OR (XIII) ANY OTHER MATTER WITH RESPECT TO THE PROPERTY EXCEPT AS HEREIN EXPRESSLY SET FORTH. CITY FURTHER ACKNOWLEDGES AND AGREES THAT IT IS PURCHASING THE DESERT WEST PROPERTY "AS IS, WHERE IS" WITH ALL FAULTS AND ALL LATENT OR PATENT DEFECTS. ADDITIONALLY, EXCEPT AS PROVIDED IN THE TRANSACTION DOCUMENTS, NO PERSON ACTING ON BEHALF OF FSW IS AUTHORIZED TO MAKE, AND BY EXECUTION HEREOF CITY ACKNOWLEDGES THAT NO PERSON HAS MADE, ANY REPRESENTATION, AGREEMENT, STATEMENT, WARRANTY, GUARANTY OR PROMISE REGARDING THE DESERT WEST PROPERTY OR THE TRANSACTION CONTEMPLATED HEREIN; AND NO SUCH REPRESENTATION, WARRANTY, AGREEMENT, GUARANTY, STATEMENT OR PROMISE, IF ANY, MADE BY ANY PERSON ACTING ON BEHALF OF FSW SHALL BE VALID OR BINDING UPON FSW UNLESS EXPRESSLY SET FORTH IN THE TRANSACTION DOCUMENTS. CITY FURTHER ACKNOWLEDGES AND AGREES THAT HAVING BEEN GIVEN THE OPPORTUNITY TO INSPECT THE DESERT WEST PROPERTY, EXCEPT AS PROVIDED IN THE TRANSACTION DOCUMENTS, CITY IS RELYING SOLELY ON ITS OWN INVESTIGATION OF THE DESERT WEST PROPERTY AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY FSW. CITY FURTHER ACKNOWLEDGES AND AGREES THAT ANY INFORMATION PROVIDED OR TO BE PROVIDED WITH RESPECT TO THE DESERT WEST PROPERTY WAS OBTAINED FROM A VARIETY OF SOURCES AND THAT FSW HAS NOT MADE, INCLUDING THE SUBMISSION OF ITEMS, ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION AND MAKES NO REPRESENTATIONS, AS TO THE ACCURACY, TRUTHFULNESS OR COMPLETENESS OF SUCH INFORMATION. EXCEPT AS PROVIDED IN THE TRANSACTION DOCUMENTS, FSW IS NOT LIABLE OR BOUND IN ANY MANNER BY ANY VERBAL OR WRITTEN STATEMENT, REPRESENTATION OR INFORMATION PERTAINING TO THE DESERT WEST PROPERTY, OR THE OPERATION THEREOF, FURNISHED BY ANY REAL ESTATE BROKER, CONTRACTOR, AGENT, EMPLOYEE, SERVANT OR OTHER PERSON. IT IS UNDERSTOOD AND AGREED THAT THE EXCHANGE PRICE HAS BEEN ADJUSTED BY PRIOR NEGOTIATION TO REFLECT THAT THE DESERT WEST PROPERTY IS SOLD BY FSW AND PURCHASED BY CITY SUBJECT TO THE FOREGOING.

CHANGE OF CONDITIONS. CITY SHALL ACCEPT THE PROPERTY AT THE CLOSING IN THE SAME CONDITION AS IT IS IN ON THE DATE OF THIS AGREEMENT, AS SUCH CONDITION SHALL HAVE CHANGED BY REASON OF NORMAL WEAR AND TEAR AND, SUBJECT TO ARTICLE VII OF THIS AGREEMENT, DAMAGE BY CONDEMNATION, FIRE OR OTHER CASUALTY. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, CITY SPECIFICALLY ACKNOWLEDGES THAT THE FACT THAT ANY PORTION OF THE LAND OR IMPROVEMENTS OR ANY EQUIPMENT OR MACHINERY THEREIN OR THEREON, OR ANY PART THEREOF MAY NOT BE IN NORMAL WORKING ORDER OR CONDITION ON THE CLOSING DATE BY REASON OF WEAR AND TEAR OR

DAMAGE BY CONDEMNATION, FIRE OR OTHER CASUALTY, SHALL NOT RELIEVE CITY OF ITS OBLIGATION TO COMPLETE THE CLOSING UNDER THIS AGREEMENT EXCEPT AS PROVIDED IN ARTICLE VII.

RELEASE. WITHOUT LIMITING THE PROVISIONS OF SECTION 4.3 OF THIS AGREEMENT AND NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT EXCEPT FOR THE REPRESENTATIONS, COVENANTS AND OBLIGATIONS OF FSW EXPRESSLY SET FORTH IN THE TRANSACTION DOCUMENTS, UPON CLOSING OF THE TRANSACTION CONTEMPLATED BY THIS AGREEMENT, CITY HEREBY RELEASES FSW, FSW'S PROPERTY MANAGER AND (AS THE CASE MAY BE) EACH OF THEIR RESPECTIVE MEMBERS, PARTNERS, PARENTS, AFFILIATE AND SUBSIDIARY ENTITIES AND ALL OF THEIR RESPECTIVE MEMBERS, OFFICERS, DIRECTORS, SHAREHOLDERS, TRUSTEES, PARTNERS, EMPLOYEES, MANAGERS AND AGENTS (COLLECTIVELY, "FSW'S AGENTS") FROM ANY AND ALL CLAIMS, DEMANDS, CAUSES OF ACTION, LOSSES, DAMAGES, LIABILITIES, COSTS AND EXPENSES (INCLUDING ATTORNEYS' FEES WHETHER SUIT IS INSTITUTED OR NOT) WHETHER KNOWN OR UNKNOWN, LIQUIDATED OR CONTINGENT (HEREINAFTER COLLECTIVELY CALLED THE "CLAIMS") ARISING FROM OR RELATING TO: (i) ANY DEFECTS (PATENT OR LATENT), ERRORS OR OMISSIONS IN THE DESIGN OR CONSTRUCTION OF THE IMPROVEMENTS WHETHER THE SAME ARE THE RESULT OF NEGLIGENCE OR OTHERWISE; AND (ii) ANY OTHER CONDITIONS RELATING TO THE PROPERTY ENVIRONMENTAL AND OTHER PHYSICAL CONDITIONS AFFECTING THE PROPERTY WHETHER THE SAME ARE A RESULT OF NEGLIGENCE OR OTHERWISE. THE RELEASE SPECIFICALLY INCLUDES, WITHOUT LIMITATION, ANY CLAIMS UNDER ANY ENVIRONMENTAL REQUIREMENTS OR UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990, AS ANY OF THE SAME MAY BE AMENDED FROM TIME TO TIME AND ANY REGULATIONS, ORDERS, RULES OF PROCEDURES OR GUIDELINES PROMULGATED IN CONNECTION THEREWITH, REGARDLESS OF WHETHER THEY ARE IN EXISTENCE ON THE DATE OF THIS AGREEMENT. CITY ACKNOWLEDGES THAT CITY IS GRANTING THIS RELEASE OF ITS OWN VOLITION AND AFTER CONSULTATION WITH CITY'S COUNSEL.

WAIVER. CITY HEREBY REPRESENTS AND WARRANTS TO FSW THAT: (i) CITY IS NOT IN A SIGNIFICANTLY DISPARATE BARGAINING POSITION FROM FSW; (ii) CITY IS REPRESENTED BY INDEPENDENT LEGAL COUNSEL OF CITY'S SELECTION; (iii) CITY IS SEEKING TO ACQUIRE THE PROPERTY, WHICH WILL NOT BE USED AS A RESIDENCE, FOR INVESTMENT PURPOSES; AND (iv) CITY IS A SOPHISTICATED REAL ESTATE INVESTOR AND HAS KNOWLEDGE AND EXPERIENCE IN FINANCIAL AND BUSINESS MATTERS THAT ENABLE IT TO EVALUATE THE MERITS AND RISKS OF THIS TRANSACTION. CITY HEREBY WAIVES TO THE FULLEST EXTENT PERMITTED BY LAW ANY RIGHTS, REMEDIES AND BENEFITS UNDER ANY CONSUMER PROTECTION LAW, WHETHER FEDERAL, STATE OR LOCAL. CITY COVENANTS NOT TO SUE FSW UNDER ANY SUCH CONSUMER PROTECTION LAW.

SURVIVAL. THE PROVISIONS OF THIS SECTION 4.3 SHALL SURVIVE THE CLOSING OR ANY TERMINATION OF THIS AGREEMENT.

4.4 Survival Beyond Closing. The representations, warranties, undertakings and agreements of FSW contained herein will not survive Closing and are merged into the Transaction Documents.

ARTICLE V REPRESENTATIONS, WARRANTIES OF CITY AS TO THE EXCHANGE FOR THE DESERT WEST PROPERTY

5.1 City's Representations. City hereby represents and warrants to FSW as of the date of this Agreement and as of the Closing Date as follows:

- (a) The City has the full right, power and authority to create TIRZ 13 and complied with all applicable laws, rules and regulation to create TIRZ 13;
- (b) Upon approval by Ordinance of City Council, City has the full right, power, and authority to consummate the land exchange as provided in this Agreement without bid or other procedure.

5.2 Survival Beyond Closing. The representations, warranties, undertakings and agreements of City contained herein survive the Closing and are not merged therein.

ARTICLE VI CLOSING ON THE DESERT WEST PROPERTY

6.1 Date and Place of Closing. Provided that City has not terminated this Agreement as herein provided and all of the other conditions of this Agreement shall have been satisfied prior to or on the Closing Date, the Closing of the Desert West shall take place on the Required Closing Date, or such earlier date as may be mutually agreed upon between City and FSW, but in all cases

simultaneously with the Closing of the NE Property. If the Closing Date does not fall on a Business Day, the Closing shall take place on the next Business Day thereafter.

6.2 Items to be Delivered at Closing

- (a) **FSW.** At the Closing, FSW shall deliver or cause to be delivered to City or the Title Company, the following items fully executed by FSW or City, as the case may be, and acknowledged where so indicated by all necessary parties in respect to the Desert West Property:
 - (i) A Special Warranty Deed (the “**Deed**”), in a form acceptable to FSW which shall include a fee simple determinable for the benefit of FSW (“**Reservations**”), duly executed and acknowledged by FSW, conveying title to the Desert West, subject only to the Permitted Exceptions and Reservations;
 - (ii) An affidavit, in compliance with Section 1445 of the Internal Revenue Code of 1986, as amended, and any regulations promulgated thereunder, stating under penalty of perjury FSW’s United States identification number and that it is not a “foreign person” as that term is defined in Section 1445, duly executed and acknowledged by FSW; and
 - (iii) Any other items reasonably requested by the Title Company as administrative requirements for consummating the Closing.
- (b) **CITY.** At the Closing, City shall deliver or cause to be delivered to FSW or the Title Company, the following items:
 - (i) NE Property Transaction Documents;
 - (iii) Appropriate evidence of authorization reasonably satisfactory to FSW and the Title Company for the consummation of the transaction contemplated by this Agreement; and
 - (iv) Any other items reasonably requested by the Title Company as administrative requirements for consummating the Closing.
- (c) **Title Company.**
 - (i) A commitment to issue at or shortly after Closing, the Owner’s Title Policy that insures City has good and indefeasible fee simple title in the Desert West Property, subject to the Permitted Exceptions, is in the amount of the Exchange Price.

6.3 Prorations. The following items shall be adjusted or prorated between FSW and City as set forth below:

- (a) **Taxes.** General real estate taxes for the then current year relating to the Desert West Property shall be prorated as of midnight preceding the Closing Date. If the Closing occurs before the tax rate is fixed for the then current year, the apportionment of taxes shall be made upon the basis of the tax rate for the immediately preceding year applied to the latest assessed valuation of the land and Improvements. Within thirty (30) days after the actual taxes for the year in which the Closing occurs are determined, FSW and City shall adjust the proration of such taxes and FSW and City, as the case may be, shall pay to the other any amount required as a result of such adjustment and this covenant shall not merge with the Deed delivered hereunder but shall survive the Closing. All special taxes or assessments assessed prior to the Closing Date shall be paid by FSW.

6.4 Recalculation of Prorations. In the event the Closing does not occur and fund as of 12:00 noon, local time, on the Closing Date, all prorations shall extend to the midnight of the following day.

6.5 Possession. Possession of the Desert West Property shall be delivered to City by FSW at the Closing subject to the rights of any approved third parties under the Permitted Exceptions.

6.6 Costs of Closing. Each party is responsible for paying the legal fees of its counsel in negotiating, preparing, and closing the transaction contemplated by this Agreement. FSW shall pay for the premium for Title Policy for the Desert West Property and City will pay for any endorsements the City requests; all real estate tax searches (if any); UCC searches (if any); the cost of a new or updated Desert West Survey (if requested by City); its own engineering inspections as well as for the charges attributable to recording the Deed for the Desert West Property and the one half of the Title Company escrow fees. Any other expenses that are incurred by either party that are expressly identified herein as being the responsibility of a particular party shall be paid by such party. All other expenses are allocated between the parties in the customary manner for sales of real property similar to the Property in El Paso County, Texas.

6.7 Provisions of Article VI to Survive Closing. The provisions of Article VI survive the Closing.

ARTICLE VII CASUALTY OR CONDEMNATION AFFECTING THE DESERT WEST PROPERTY

7.1 Right of Termination. FSW agrees to give City and Title Company prompt notice of any fire or other casualty affecting the Desert West Property or of any actual or threatened taking or condemnation of all or any portion of the Desert West Property other than the subject condemnation action. If, prior to the Closing, there shall occur damage to the Desert West Property caused by fire or other casualty, then FSW or City shall have the right to postpone the Closing Date or terminate this Agreement by written notice delivered to the other party within thirty (30) Business days after City has received notice from FSW of that event or the date of the fire or other casualty or FSW's receipt of notice of taking or condemnation, whichever shall first occur. If this

Agreement is terminated pursuant to this Section 7.1 the parties shall have no further obligations under this Agreement, or to each other with respect to the subject matter of this Agreement. Notwithstanding the foregoing, in the event that the cost of repairing or restoring such damage shall be covered by available insurance and such cost shall be less than \$10,000, then City shall proceed to Closing and FSW shall assign at Closing to City its right, title and interest in the insurance proceeds available to repair or restore the damage or destruction.

7.2 Postponement of Closing. In the event that City gives notice to postpone the Closing Date pending a determination of the nature and extent of such damage or destruction and the availability and adequacy of insurance proceeds, the postponement shall be in effect for an additional twenty (20) Business Days after the thirty (30) Business Day period that City has to give notice of its desire to postpone (the “**Damages Determination Period**”).

7.3 Insurance for Repair. If the cost to repair or replace the damage is reasonably estimated by FSW’s insurance adjuster to exceed \$10,000, then at City’s election and in its sole discretion, City may elect to proceed with the Closing and at the Closing, FSW shall assign to City its right, title and interest in the insurance proceeds available to repair or restore the damage or destruction to the extent assignable and subject to requirements of FSW’s insurance provider.

ARTICLE VIII

TITLE AND SURVEY AND INSPECTION OF THE NE PROPERTY

8.1 Title Commitment. Within five (5) Business Days following the Effective Date, FSW agrees to order, at FSW’s sole cost and expense, a current Title Commitment for the NE Property (the “**NE Title Commitment**”), a copy of which shall be furnished to FSW and City. The NE Title Commitment shall contain the express commitment of the Title Company to issue an Owner’s Title Policy for the NE Property. The NE Title Commitment shall be accompanied by copies of all instruments that create or evidence title exceptions affecting the NE Property.

8.2 Survey. FSW may obtain an update of any existing survey or obtain a new survey at FSW’s cost (any such updated survey or new survey being herein called the “**NE Survey**”). Upon approval of the NE Survey by City and FSW, the parties agree to use the metes and bounds description of the NE Property contained in the NE Survey, if different from that appended hereto as **Exhibits A**, for purposes of describing the NE Property in the special warranty deed conveying to FSW title to the NE Property.

8.3 Review of Title Commitment and Survey. FSW shall have a period of ninety (90) days following the Effective Date (the “**Title Review Period**”) in which to review the NE Title Commitment and the NE Survey, if any, and give written notice to City specifying FSW’s objections, if any, to the NE Title Commitment and / or the NE Survey (the “**FSW’s Objection Letter**”). If FSW fails to give the FSW’s Objection Letter to City prior to the expiration of the Title Review Period, then all exceptions to title shown on Schedule B, but not Non-Permitted Liens on Schedule C, of the NE Title Commitment are deemed to be Permitted Exceptions. Except as the FSW may direct, all Non -Permitted Liens on Schedule C can never be deemed to be Permitted

Exceptions and FSW shall have no obligation to object to them. Any Non-Permitted Liens on Schedule C will be removed by City on or before the Closing Date.

8.4 City's Obligation to Cure; FSW's Right to Terminate. If FSW delivers to City the FSW's Objection Letter before the end of the Title Review Period, then City may, but is not obligated to, within ten (10) Business Days of the date of receipt of such letter (the "**NE Cure Period**"), give written notice ("**City's Title Cure Notice**") to FSW of City's intention to satisfy the FSW's objections concerning Schedule B items. It is expressly understood that in no event shall City be obligated or required to take any action, bring any action or institute any proceeding, or to otherwise incur any costs or expenses in order to attempt to eliminate any matter contained in FSW's Objection Letter. If City fails to timely give FSW City's Title Cure Notice or if City fails or refuses to satisfy any or all of FSW's objections, including exceptions related to releases of liens shown on Schedule C, of the Title Commitment, including, but not limited to any Non-Permitted Liens, then FSW, as its sole and exclusive right and remedy, shall notify City in writing prior to expiration of the Inspection Period, that either:

- (a) FSW waives its right to further object to any objections it has asserted which City has failed or refused to satisfy in which event those objections asserted by FSW shall be deemed Permitted Exceptions and waived by FSW and the parties shall proceed to close this transaction; or
- (b) Terminate this Agreement, in which event FSW and City shall have no further obligations, one to the other, with respect to the subject matter of this Agreement except as otherwise provided herein.

Notwithstanding the foregoing, in the event FSW fails to deliver City written notice of its election under subsection (a) or (b) above, prior to 5:00 p.m. Mountain Time on the last day of the Inspection Period, then FSW shall be deemed to have elected to waive the objections. All objections that are waived, or deemed to be waived by FSW shall become Permitted Exceptions.

8.5 Additional Objections to Title and Survey. In the event any new matters affecting City's title appear on the NE Title Commitment subsequent to the Inspection Period ("**New NE Objection**"), FSW shall have the right to notify City of such New NE Objection within ten (10) days from learning of such New NE Objection. In the event City fails to cure the New NE Objection on or before Closing, FSW may either, (i) waive the New NE Objection and proceed to Closing subject to the New NE Objection as a Permitted Exception, (ii) extend the Closing for up to ten (10) days allowing additional time for City to cure the New NE Objection, reserving the right to terminate the Agreement if the New NE Objection is not cured within the additional ten (10) day period, or (iii) terminate the Agreement in which event FSW and City shall have no further obligations, one to the other, with respect to the subject matter of this Agreement except as otherwise provided herein.

8.6 Title Policy. At the Closing, or as soon thereafter as the Title Company can issue the same, at City's sole cost and expense, an Owner's Title Policy is to be furnished to FSW by the Title Company for the NE Property. The Owner's Title Policy shall be issued by the Title Company and shall insure that FSW has good and indefeasible fee simple title to the NE Property, subject

only to the Permitted Exceptions. The Owner's Title Policy shall contain no exceptions other than Permitted Exceptions and shall provide that:

- (a) The survey exception may be amended, at FSW's expense, to except only "shortages in area";
- (b) The exception for rights of parties in possession shall be deleted;
- (c) The tax exception shall be limited to taxes for the year of Closing and subsequent years not yet due and payable; and
- (d) Unless waived by FSW, all Non-Permitted Liens shall be released and satisfied prior to or at Closing and such items and requirements shall not be exceptions to the Owner Title Policy.

8.7 Inspection.

- (a) From the Effective Date until termination of this Agreement, FSW, at FSW's expense, shall have the right to make such physical examinations, studies, appraisals, inspections, engineering, environmental and insurance underwriting tests and investigations (the "Inspections") of the NE Property as FSW may deem advisable. City shall reasonably cooperate with FSW in making the NE Property reasonably available for FSW's Inspections. FSW may also re-inspect the NE Property prior to Closing to verify that it has remained in similar physical shape as it was during the Inspection Period. All inspection fees, appraisal fees, engineering fees and other costs and expenses of any kind incurred by FSW relating to such inspection and its other due diligence shall be at the sole cost and expense of FSW. FSW agrees to be responsible and liable for any physical damages and mechanic's and materialmen's liens, and reasonable attorneys' fees incurred by City caused by FSW's entry onto the NE Property; provided FSW will not be responsible for the mere discovery of conditions on the NE Property or existing conditions on the NE Property. The provisions of this Section shall survive the Closing or the earlier termination of this Agreement. If FSW elects to terminate this Agreement in accordance with the terms hereof, FSW shall provide City with copies of all documents, tests and reports generated from FSW's Inspection within five (5) Business Days following the date of FSW's termination.
- (b) If FSW determines that the NE Property is not satisfactory for any reason or for no reason, in its sole and absolute discretion, then FSW may, as its sole and exclusive remedy, terminate this Agreement by giving written notice to City on or before the last day of the Inspection Period. Except as provided otherwise in this Agreement, if FSW has not terminated this Agreement during the Inspection Period, then FSW waives its right to terminate this Agreement under Section 8.7. If FSW terminates this Agreement during the Inspection Period or otherwise allowed in this Agreement, then, in either event, thereafter FSW and City shall have no further

obligations to each other with respect to the subject matter of this Agreement except as otherwise expressly provided herein.

**ARTICLE IX
REPRESENTATIONS, WARRANTIES, COVENANTS,
AND AGREEMENTS OF THE CITY AS TO THE NE PROPERTY**

9.1 Representations and Warranties of the City. The City represents and warrants to FSW as of the Effective Date and as of the Closing Date as follows:

- (a) The City has the full right, power, and authority to convey to FSW the NE Property as provided in this Agreement and to carry out the City's obligations hereunder, and all requisite action necessary to authorize the City to enter into this Agreement and to carry out the City's obligations hereunder has been, or on the Closing Date will have been, taken, and this Agreement constitutes a valid and binding obligation of the City, enforceable in accordance with its terms;
- (b) TIRZ 13 has been created by City in compliance with all laws, rules and regulations and there is no litigation threatened or pending affecting TIRZ 13;
- (c) On the Effective Date, and as of the date of Closing, there are no adverse or other parties in possession of the NE Property or who have any leasehold rights in the NE Property;
- (d) There is no litigation pending or, to the City's current actual knowledge, threatened, affecting the NE Property; and the City has no knowledge of, and has received no written notice from, any governmental authority requiring any work, repairs, construction, alterations or installations on or in connection with the NE Property, or asserting any violation of any federal, state or municipal laws, ordinances, codes, orders, regulations or requirements affecting any portion of the NE Property, including, without limitation, the Americans with Disabilities Act and any applicable environmental laws or regulations;
- (e) The City has not received written notice of any pending condemnation action other than that related to this Agreement with respect to all or any portion of the NE Property and there are no existing condemnation or other legal proceedings affecting the existing use of the NE Property by any governmental authority having jurisdiction over or affecting all or any part of the NE Property;
- (e) At Closing, the City shall have good and indefeasible title to the NE Property free and clear of any known claim, lien, or encumbrance, specifically including any claims for mechanics liens, subject only to the Permitted Exceptions;
- (f) The City has no notice that the current use of the property does not comply with all currently applicable zoning ordinances and governmental requirements;

- (g) No one will have the right to occupy the NE Property after the Closing Date and no contracts of any kind, including contracts for maintenance, security, disposal, or fire suppression will survive the Closing;
- (h) City is not a “foreign person” within the meaning of the Foreign Investment in Real Property Tax Act or the Tax Reform Act of 1986, and FSW is not obligated to withhold any portion of the Purchase Price for the benefit of the Internal Revenue Service;
- (i) To the best of City’s knowledge the NE Property is not in violation of any applicable law, now, nor has it at any time during City’s ownership thereof been, used for the manufacture, processing, distribution, use, treatment, storage, disposal, placement, transport or handling of toxic materials, hazardous wastes or hazardous substances (as those terms are defined in the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. Section 6901 et seq.) or the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended (42 U.S.C. Section 9601 et seq.); oils, petroleum-derived compounds; or pesticides (“**Hazardous Materials**”). In addition, no (i) underground storage tanks, (ii) asbestos (either commercially processed or excavated raw materials), (iii) electrical transformers, fluorescent light fixtures with ballast, or other items or equipment containing polychlorinated biphenyls, or (iv) other Hazardous Materials are present on the NE Property in violation of any applicable law. City has not received any written notice from any neighboring property owners indicating they have any concerns about existing environmental conditions which could affect the NE Property or indicating in any way they might hold City liable for any contribution to clean up and remediate such condition; and
- (j) No party (other than FSW) has any right or option to acquire all or any part of the NE Property, whether subject to earnest money contract, option agreement, right of first refusal, reversionary or future interests, or right of reverter.

9.2 Agreements of the City. The City covenants and agrees with FSW as follows:

- (a) **Ownership Documents.** Within ten (10) Business Days following the Effective Date, the City shall deliver to FSW the following items (the “**Ownership Documents**”) with respect to the NE Property, to the extent in the possession or under the reasonable control of the City:
 - (i) Any “as-built” plans, specifications, and mechanical drawings for Improvements and a copy of the results of all physical inspections, all structural, mechanical, engineering or soil reports, if any, prepared with respect to the NE Property;
 - (ii) Copies of all development plans, zoning documents and drainage studies prepared by or for the CITY.

- (iii) A copy of current real estate tax bills or other documentation showing the amount of current Property Taxes and the assessed value of the NE Property and any Improvements, if any; and
- (iii) A copy of all environmental reports, inspections or assessments, engineering reports, prior surveys, if any, of the NE Property.

If the parties fail to consummate the transaction described herein for any reason, FSW agrees to return to the City all materials delivered by or on behalf of the City pursuant to or in connection with this Agreement within ten (10) Business Days of such event.

9.3 Survival Beyond Closing. The representations, warranties, undertakings and agreements of the City contained herein survive the Closing and are not merged therein. The provisions of this Section 9.3 shall survive any termination of this Agreement as well as the Closing.

ARTICLE X REPRESENTATIONS, WARRANTIES OF FSW AS TO EXCHANGE FOR THE NE PROPERTY

10.1 FSW's Representations. FSW hereby represents and warrants to the City as of the date of this Agreement and as of the Closing Date as follows:

- (a) Once this contract is signed by the FSW's representative, FSW has the full right, power, and authority to consummate the land exchange as provided in this Agreement.

10.2 Survival Beyond Closing. The representations, warranties, undertakings and agreements of FSW under Section 10.1 contained herein survive the Closing and are not merged therein.

ARTICLE XI CLOSING ON THE NE PROPERTY

11.1 Date and Place of Closing. Provided that FSW has not terminated this Agreement as herein provided and all of the other conditions of this Agreement shall have been satisfied prior to or on the Closing Date, the Closing of the NE Property shall take place on the Required Closing Date, or such earlier date as may be mutually agreed upon between City and FSW, but in all cases simultaneously with the Closing of the Desert West Property. If the Closing Date does not fall on a Business Day, the Closing shall take place on the next Business Day thereafter.

11.2 Items to be Delivered at Closing

- (a) **City.** At the Closing, the City shall deliver or cause to be delivered to FSW or the Title Company, the following items fully executed by FSW or City, as the case may be, and acknowledged where so indicated by all necessary parties in respect to the NE Property:
 - (i) A Special Warranty Deed (the “**Deed**”), duly executed and acknowledged by City, conveying title to the NE Property, in substantially the form of **Exhibit C** appended hereto, subject only to the Permitted Exceptions;
 - (ii) An affidavit, in compliance with Section 1445 of the Internal Revenue Code of 1986, as amended, and any regulations promulgated thereunder, stating under penalty of perjury City’s United States identification number and that it is not a “foreign person” as that term is defined in Section 1445, duly executed and acknowledged by City; and
 - (iii) Any other items reasonably requested by the Title Company as administrative requirements for consummating the Closing.
 - (iv) Assignment of General Intangibles, including but not limited to, the assignment of all development plans, surveys, engineering studies and other documents prepared by or for the CITY.
- (b) **FSW.** At the Closing, FSW shall deliver or cause to be delivered to City or the Title Company, the following items:
 - (i) The Desert West Transaction Documents;
 - (ii) Appropriate evidence of authorization reasonably satisfactory to the City and the Title Company for the consummation of the transaction contemplated by this Agreement; and
 - (iii) Any other items reasonably requested by the Title Company as administrative requirements for consummating the Closing.
- (c) **TITLE COMPANY.**
 - (i) A commitment to issue at or shortly after Closing, the Owner’s Title Policy that insures FSW has good and indefeasible fee simple title in the NE Property, subject to the Permitted Exceptions, is in the amount of the Exchange Price.

11.3 Prorations. The following items shall be adjusted or prorated between FSW and City as set forth below:

- (a) **Taxes.** General real estate taxes, if any, for the then current year relating to the NE Property shall be prorated as of midnight preceding the Closing Date. If the Closing occurs before the tax rate is fixed for the then current year, the apportionment of taxes shall be made upon the basis of the tax rate for the immediately preceding year applied to the latest assessed valuation of the NE Property and any Improvements. Within thirty (30) days after the actual taxes for the year in which the Closing occurs are determined, FSW and City shall adjust the proration of such taxes and FSW and City, as the case may be, shall pay to the other any amount required as a result of such adjustment and this covenant shall not merge with the Deed delivered hereunder but shall survive the Closing. All special taxes or assessments assessed prior to the Closing Date shall be paid by the City.

11.4 Recalculation of Prorations. In the event the Closing does not occur and fund as of 12:00 noon, local time, on the Closing Date, all prorations shall extend to the midnight of the following day.

11.5 Possession. Possession of the NE Property shall be delivered to FSW by the City at the Closing subject to the rights of any approved third parties under the Permitted Exceptions.

11.6 Costs of Closing. Each party is responsible for paying the legal fees of its counsel in negotiating, preparing, and closing the transaction contemplated by this Agreement. The City shall pay for the premium for Title Policy for the NE Property and FSW will pay for any endorsements FSW requests; all real estate tax searches (if any); UCC searches (if any); the cost of a new or updated NE Survey (if requested by FSW); its own engineering inspections as well as for the charges attributable to recording the Deed and the one half of the Title Company escrow fees. Any other expenses that are incurred by either party that are expressly identified herein as being the responsibility of a particular party shall be paid by such party. All other expenses are allocated between the parties in the customary manner for sales of real property similar to the Property in El Paso County, Texas.

11.7 Provisions of Article XI to Survive Closing. The provisions of Article XI survive the Closing.

ARTICLE XII CASUALTY OR CONDEMNATION AFFECTING NE PROPERTY

12.1 Right of Termination. City agrees to give FSW and Title Company prompt notice of any fire or other casualty affecting the NE Property or of any actual or threatened taking or condemnation of all or any portion of the NE Property other than the subject condemnation action. If, prior to the Closing, there shall occur damage to the NE Property caused by fire or other casualty, then FSW or City shall have the right to postpone the Closing Date or terminate this Agreement by written notice delivered to the other party within thirty (30) Business Days after FSW has received notice from City of that event or the date of the fire or other casualty or City's receipt of notice of taking or condemnation, whichever shall first occur. If this Agreement is terminated pursuant to this Section 12.1 the parties shall have no further obligations under this

Agreement, or to each other with respect to the subject matter of this Agreement. Notwithstanding the foregoing, in the event that the cost of repairing or restoring such damage shall be covered by available insurance and such cost shall be less than \$10,000, then FSW shall proceed to Closing and City shall assign at Closing to FSW its right, title and interest in the insurance proceeds available to repair or restore the damage or destruction.

12.2 Postponement of Closing. In the event that FSW gives notice to postpone the Closing Date pending a determination of the nature and extent of such damage or destruction and the availability and adequacy of insurance proceeds, the postponement shall be in effect for an additional twenty (20) Business Days after the thirty (30) Business Day period that FSW has to give notice of its desire to postpone (the “**Damages Determination Period**”).

12.3 Insurance for Repair. If the cost to repair or replace the damage is reasonably estimated by City’s insurance adjuster to exceed \$10,000, then at FSW’s election and in its sole discretion, FSW may elect to proceed with the Closing and at the Closing, City shall assign to FSW its right, title and interest in the insurance proceeds available to repair or restore the damage or destruction.

ARTICLE XIII FAILURE TO CONSUMMATE THE LAND EXCHANGE

13.1 Effect of Failure to Consummate the Land Exchange. Should the land exchange contemplated herein not occur for any reason, no party thereafter shall have any further obligations to the other hereunder except for any covenants and obligations which expressly survive such termination. Additionally, in the event that closing has not occurred on or before twelve (12) months from the effective date, FSW shall have the unilateral right to terminate the Agreement and the parties shall have no further obligations to each other. Should the City wish to close earlier or later, the City may request that FSW consent to an earlier or later closing date, which consent shall not be unreasonably withheld.

13.2 Conditions Precedent for FSW’s Benefit.

- (a) **Representations, Warranties and Covenants; Obligations of City; Certificate.** All of City’s Representations made in this Agreement shall be true and correct in all material respects as of the date hereof and as of the date of Closing as if then made; there shall have been no material adverse change in the condition of the NE Property, from the date of acceptance of this Agreement and no matter, condition or event shall have occurred which could in FSW’s reasonable judgment, materially and adversely affect the proposed use of the NE Property by FSW or any part thereof,. City shall have performed in all material respects all of its covenants and other obligations under this Agreement and City shall have executed and delivered to FSW at Closing a certificate to the foregoing effect.
- (b) **Title Insurance.** Good and indefeasible fee simple title to the Desert West Property shall be insurable as such by the Title Company, subject only to Permitted Exceptions and standard pre-printed exceptions, with all applicable deletions of standard exceptions and endorsements permitted under applicable state law which

are customarily required by institutional investors purchasing property comparable to the NE Property.

- (c) **Title to Property.** City shall be the sole owner of good and indefeasible fee simple title to the NE Property, free and clear of all liens, encumbrances, restrictions, conditions and agreements except for Permitted Exceptions. City shall not have taken any action or permitted or suffered any action to be taken by others from the date hereof and through and including the date of Closing that would materially and adversely affect the status of title to the NE Property.
- (d) **Title Objections.** The satisfaction of any New NE Objection made by FSW to matters shown by the NE Title Commitment and/or the NE Survey pursuant to Section 8.5.
- (e) **Survey.** The NE Survey shall be adequate for the Title Company to delete any exception for general survey matters in the Owners' Policy except for "shortages in area".
- (f) **Development Agreement.** Within thirty (30) days from the Effective Date of this Agreement, FSW and CITY have entered into a development agreement on mutually agreeable terms setting forth certain obligations of the City to be completed prior to Closing.
- (g) **Restraint.** The transactions contemplated under this Agreement to be affected on the Closing Date shall not have been threatened to be retained or prohibited or restrained or prohibited by any injunction or order or judgment rendered by any court or other governmental agency of competent jurisdiction and no proceeding shall have been threatened or instituted and be pending in which any group, person or Entity seeks to restrain such transactions or otherwise to attach any of the Property.

13.4 Failure of Conditions Precedent. If any Condition Precedent to FSW's Performance cannot or will not be satisfied prior to Closing, or upon the occurrence of any other event that would entitle FSW to terminate this Agreement and its obligations hereunder, and if City fails to cure any such matter or satisfy that condition within three (3) Business Days after notice thereof from FSW (or such other time period as may be explicitly provided for herein), FSW, at its option, may elect (a) to terminate this Agreement, in which event all other rights and obligations of FSW and City hereunder (except those set forth herein which expressly survive a termination of this Agreement) shall terminate immediately; (b) elect to proceed to Closing. Notwithstanding anything to the contrary herein, if FSW and the CITY have not entered into the Development Agreement described in paragraph (f) above, FSW shall have the right to terminate the Agreement immediately upon notice to the City and shall have no further obligations under this Agreement.

13.5 Conditions For City's Benefit.

- (a) **Restraint.** The transactions contemplated under this Agreement to be affected on the Closing Date shall not have been restrained or prohibited by any injunction or order or judgment rendered by any court or other governmental agency of competent jurisdiction and no proceeding shall have been instituted and be pending in which any other group, person or Entity seeks to restrain such transactions or otherwise to attach any of the Property;
- (b) **FSW's Obligations.** FSW shall have timely complied with its obligations hereunder;
- (c) **Representations, Warranties and Covenants.** All warranties and representations made by FSW herein shall be truthful in all respects.

13.6 The obligations of City to consummate the transaction contemplated hereby are subject to the preceding conditions, any of which, if not fulfilled by the Closing or as otherwise provided herein, shall entitle City (at its option) to terminate this Agreement as its sole and exclusive remedy.

ARTICLE XIV BROKERAGE COMMISSIONS

14.1 **Representations Concerning Brokerage Commission.** City hereby represents and warrants to FSW that it has not contracted or entered into any agreement with any real estate broker, agent, finder, or any other party in connection with this transaction, and that City has not taken any action which would result in any real estate broker's, finder's, or other fees or commissions being due or payable to any other party with respect to the transaction contemplated hereby. FSW hereby represents and warrants to City that FSW has not contracted or entered into any agreement with any real estate broker, agent, finder, or other party in connection with this transaction.

ARTICLE XV GENERAL PROVISIONS

15.1 **Assignability.** Neither party may assign its interest in this Agreement without the prior written consent of the other party. Any attempt to assign this Agreement without prior written consent of the other party will be of no effect and will be an event of default hereunder. Notwithstanding anything to the contrary, on or before Closing, FSW may assign its rights to receive the NE Property to an Affiliate or to members of FSW; provided FSW will remain responsible for conveying or causing the Desert West Property to be conveyed at the Closing as part of the exchange.

15.2 Binding Effect. This Agreement shall be binding upon the parties hereto and their respective successors and assigns.

15.3 Entire Agreement / Governing Law. This Agreement constitutes the entire agreement between the parties, and supersedes all prior agreements and understandings, written or oral, regarding the subject matter of this Agreement, and may be amended or supplemented only by an instrument in writing, executed by the party against whom enforcement is sought. This Agreement shall be governed in all respects, including validity, interpretation and effect, by and shall be enforceable in accordance with the laws of the State of Texas.

15.4 Notices. Any notice or communication required or permitted hereunder shall be deemed to be delivered, whether actually received or not, when addressed to the intended recipient at the address provided below: (a) three (3) Business Days after being deposited in the United States mail, postage fully prepaid, registered or certified mail, return receipt requested; (b) one (1) Business Day after being deposited with a nationally recognized overnight courier, postage fully prepaid; or (c) sent by fax transmission upon transmission and confirmation of receipt; provided any notice sent by fax transmission will be followed by delivery using method (b), above, deposited on the following Business Day. Any address for notice may be changed by giving notice thereof as provided in this Section. The addresses and fax numbers for notice purposes are as follows:

City: City Manager
City of El Paso
P.O. Box 1890
El Paso, Texas 79950-1890

FSW: FSW Investments, LP
123 West Mills Ave.
Suite 600
El Paso, Texas 79901
Attn: William Kell and Brent D. Harris

With copy to: Gordon, Davis, Johnson & Shane, PC
4695 N. Mesa
El Paso, Texas 79912
Attn: Yolanda Giner
Telephone: (915) 545 - 1133
Facsimile: (915) 545 - 4433
(e-mail for reference only: Yginer@eplawyers.com)

15.5 Severability. If any provision of this Agreement shall be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining portion shall not in any way be affected or impaired.

15.6 Time. Time is of the essence in this Agreement and each and every provision hereof; provided, if any date specified in this Agreement for the performance of an obligation, the delivery of an item, the giving of a notice or the expiration of a time period falls on a day other than a Business Day, then this Agreement shall be automatically revised so that such date falls on the next occurring Business Day.

15.7 Interpretation. FOR PURPOSES OF THIS AGREEMENT, TIME SHALL BE CONSIDERED OF THE ESSENCE. The titles, captions and section headings in this Agreement are for convenience only and shall not define, limit or expand the scope of any provision hereof. FSW and City have agreed to the particular language of this Agreement, and any question regarding its meaning shall not be resolved by any rule providing for interpretation against the party who caused the uncertainty to exist or against the draftsman. In the event any words or phrases in this Agreement are stricken out or otherwise eliminated, whether or not any other words or phrases are added in their place, this Agreement shall be construed as though such words or phrases were never included herein and no inference shall be drawn therefrom. Unless the context indicates otherwise, (i) the terms “hereof”, “hereunder” and “herein” refer to this Agreement as a whole, (ii) the singular includes the plural and the masculine gender includes the feminine and neuter, and (iii) all references to articles, sections and subsections refer to the articles, sections and subsections of this Agreement.

15.8 Counterparts. This Agreement may be executed in separate counterparts. It shall be fully executed when each party whose signature is required has signed at least one (1) counterpart even though no one (1) counterpart contains the signatures of all of the parties to this Agreement.

15.9 Delivery. FSW and City agree that executed copies of this Agreement may be delivered by facsimile or email (in PDF format), and the same shall have the same validity as if they were delivered in person.

15.10 1031 Exchange. FSW and City acknowledge and agree that the exchange of the Property may be part of a tax-free exchange under Section 1031 of the Internal Revenue Code for either FSW or City. Each party hereby agrees to take all reasonable steps on or before the Closing Date to facilitate such exchange if requested by the other party.

15.11 Waiver of Sovereign Immunity. The City hereby waives its sovereign immunity and similar rights related to its obligations in this Agreement. The City expressly agrees that, in all things relating to this Agreement, the City enters into this Agreement for the purposed of performing a proprietary function, as defined as the Texas Tort Claims Act. This provision shall survive Closing and shall be contained in the Closing documents and Incentive Agreement.15.12

15.12 Default by FSW. Notwithstanding anything to the contrary contained herein, in the event of a default by FSW under this Agreement, the City agrees that its sole and exclusive remedy shall be to terminate the Agreement. Upon such termination, the parties shall have no further obligations herein.

ADDITIONAL LAND
XVII

17.1 **Additional Land.** During the Inspection Period, City and FSW agree to attempt to negotiate a purchase option for the additional land known as Painted Dunes Golf Course identified on **Exhibit E**, under terms and conditions agreeable to the City and FSW. Failure by the parties to come to an agreement on the additional land purchase option will not affect the remaining terms and conditions of this Agreement.

[Signatures on Following Page]

CITY OF EL PASO, TEXAS

By: _____
Tomàs Gonzàlez
City Manager

APPROVED AS TO FORM:



Roberta Brito
Assistant City Attorney

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This Instrument was acknowledged before me on the ____ day of _____, 2018, by Tomàs Gonzàlez, City Manager of the City of El Paso, Texas, on behalf of the City of El Paso, Texas.

Notary Public, State of Texas

My Commission Expires:

FSW INVESTMENTS, L.P.,
a Texas limited partnership

By: FSW Investments Management, LLC
Its: General Partner

By: _____
William Kell, Vice President

STATE OF TEXAS §
 §
COUNTY OF EL PASO §

This instrument was acknowledged before me this _____ day of October, 2018, by William Kell, Vice President of FSW Investments Management, LLC, a Texas limited liability company, the General Partner of FSW Investments, L.P., a Texas limited partnership, on behalf of said limited partnership.

(SEAL)

Notary Public in and for State of Texas

Print name of notary

My Commission Expires: _____

EXHIBIT "A"
NE Property



EXHIBIT "B"
Desert West Property



EXHIBIT "C"
Deed

NOTICE OF CONFIDENTIALITY RIGHTS: IF YOU ARE A NATURAL PERSON, YOU MAY REMOVE OR STRIKE ANY OR ALL OF THE FOLLOWING INFORMATION FROM ANY INSTRUMENT THAT TRANSFERS AN INTEREST IN REAL PROPERTY BEFORE IT IS FILED FOR RECORD IN THE PUBLIC RECORDS: YOUR SOCIAL SECURITY NUMBER AND DRIVER'S LICENSE NUMBER

SPECIAL WARRANTY DEED

STATE OF _____ §
COUNTY OF _____ §

_____, a _____ ("**Grantor**"),
for and in consideration of the sum of Ten and No/100 Dollars (\$10.00) and other valuable consideration,
the receipt and sufficiency of which consideration are hereby acknowledged, has Granted, Sold, and
Conveyed, and by these presents does Grant, Sell, and Convey, unto _____,
a _____, ("**Grantee**") having an address of _____
_____, (i) all that real property situated
in the County of _____, State of _____, and more particularly described on **Exhibit A** attached
hereto and made a part hereof for all purposes (the "**Land**"), and (ii) all Grantor's right, title and interest in
all easements, rights of way, privileges, appurtenances and other rights, pertaining to the Land (collectively,
the "**Property**").

This Deed is made and accepted expressly subject to the matters set forth in Exhibit B attached hereto and made a part hereof for all purposes, but only to the extent the same remain in affect and applicable to the Property (the **“Reservations From and Exceptions to Conveyance and Warranty”**).

TO HAVE AND TO HOLD the Property, together with all and singular the rights and appurtenances belonging in any way to the Property, unto the said Grantee, its successors and assigns forever, and Grantor binds itself and its successors and assigns to warrant and forever defend all and singular the Property to Grantee, its successors and assigns against every person lawfully claiming or to claim all or any part of the Property, by, through, or under Grantor, but not otherwise, and subject to the Reservations From and Exceptions to Conveyance and Warranty.

Signature Page Follows

IN WITNESS WHEREOF, Grantor has executed this Deed, to be effective as of this _____ day
of _____, 20____.

GRANTOR:

a _____

By: _____
a _____
its _____

By: _____
Name: _____
Title: _____

STATE OF _____ §

COUNTY OF _____ §

This instrument was acknowledged before me this _____ day of _____, 20____, by
_____, _____ of _____, a
_____, on behalf of said _____.

(SEAL)

Notary Public in and for State of _____

Print name of notary

My Commission Expires: _____

GRANTEE:

a _____

By: _____
a _____
its _____

By: _____
Name: _____
Title: _____

STATE OF _____ §

COUNTY OF _____ §

This instrument was acknowledged before me this _____ day of _____, 20____, by
_____, _____ of _____, a
_____, on behalf of said _____.

(SEAL)

Notary Public in and for State of _____

Print name of notary

My Commission Expires: _____

EXHIBIT A
To Special Warranty Deed
LEGAL DESCRIPTION

EXHIBIT B
to Special Warranty Deed

Reservations From and Exceptions to Conveyance and Warranty

- I. Specifically listed Permitted Exceptions.