

THIRD AMENDED WAIVER AND RELEASE AGREEMENT

This Third Amended Waiver and Release Agreement (“Agreement”) is entered into between the State of Colorado, acting by and through the Colorado Economic Development Commission (“Commission”), the City of Colorado Springs, Colorado (“City”), and the Colorado Springs Urban Renewal Authority (“CSURA”). Throughout this Agreement, the Commission, City, and CSURA also are referred to collectively as the “Parties,” and individually as a “Party.”

RECITALS

WHEREAS, pursuant to C.R.S. § 24-3-101, the Commission is an agency of the State of Colorado;

WHEREAS, the City is a home rule city and Colorado municipal corporation and, with respect to the application described below, is authorized to act by and through its Mayor; and

WHEREAS, CSURA is a body corporate and politic of the State of Colorado established pursuant to Part 1 of Article 25 of Title 31, C.R.S., and is authorized to act by and through its Board of Commissioners; and

WHEREAS, the Commission is responsible for reviewing and approving local government applications for awards of state sales tax increment revenue to support regional tourism projects under the Colorado Regional Tourism Act, §§ 24-46-301, through -310, C.R.S. (2021) (“Act”); and

WHEREAS, by application dated November 25, 2013, the City of Colorado Springs, Colorado sought a state sales tax increment revenue award under the Act to support a regional tourism project known as the “City for Champions Project” (“Project”), which is comprised of four Project Elements known as the U.S. Olympic Museum and Hall of Fame, the Colorado Sports & Event Center, the University of Colorado Colorado Springs Sports Medicine and Performance Center, and the United States Air Force Academy Gateway Visitor Center (“USAFA Visitor Center”); and

WHEREAS, after determining that the proposed Project materially met each of the criteria for approval set forth in C.R.S. § 24-46-304(3) of the Act, the Commission voted to approve an award of state sales tax increment revenue for the Project on December 16, 2013, and authorized CSURA to act as the Financing Entity for the Project; and

WHEREAS, C.R.S. §§ 24-46-305(3) and (4) of the Act required that, upon approval of an application submitted by a local government pursuant to the Act, the Commission shall adopt a written resolution specifying: (a) the local government that has been approved to undertake a regional tourism project; (b) the area of the regional tourism zone; (c) whether the Commission has authorized the creation of a regional tourism authority; (d) the percentage of state sales tax increment revenue that will be dedicated to the regional tourism project; and (e) any conditions of approval imposed by the Commission and incorporated in writing into the Commission’s resolution of approval; and

WHEREAS, the Commission adopted Resolution No. 3 governing the award of state sales tax increment revenue to the Project, including a Minimum Element Allocation Percentage dedicated to each Project Element, effective as of December 16, 2013; and

WHEREAS, the Parties intend that all capitalized words and terms contained in, but not expressly defined by, this Agreement, including these recitals, shall have the same meanings as those defined by Resolution No. 3, as heretofore amended in conformity with motions approved by the Commission on: June 21, 2018; November 15, 2018; December 7, 2018; July 17, 2019; November 12, 2019; November 21, 2019; March 19, 2020; April 16, 2020; and December 17, 2020 collectively attached hereto as Exhibit A, and collectively referred to hereinafter as “Resolution No. 3, as previously amended”; and

WHEREAS, C.R.S. § 24-46-309(2) of the Act and Resolution No. 3, as previously amended, require substantial work on each Project Element toward the goals specified in the application pursuant to C.R.S. § 24-46-304 to commence within five years of December 16, 2013, subject to a one year reinstatement of approval by the Commission upon a showing of good cause for the delay; and

WHEREAS, on November 15, 2018, the Commission extended the December 16, 2018 Commencement of Substantial Work deadline for the USAFA Visitor Center Project Element by one year to December 16, 2019; and

WHEREAS, C.R.S. § 24-46-309(2) of the Act requires that, if substantial work toward the goals specified in the application for a Project Element does not commence within one year of reinstatement of approval from the Commission, the Commission shall revoke approval of the Project Element; and

WHEREAS, as of November 21, 2019, the City and CSURA had made significant progress toward the Commencement of Substantial Work for the USAFA Visitor Center Project Element, but the following conditions of approval were anticipated to obtain after December 16, 2019, but not later than March 31, 2020: (1) the Visitor Center Business Improvement District (“BID”) will issue at least \$65,185,000.00 in Bonds to support the USAFA Visitor Center and related master infrastructure improvements; (2) CSURA will enter into a pledge agreement with the BID in which the Dedicated Revenue for USAFA Visitor Center will be remitted to the BID and pledged to the payment of the Series A, B, and C Bonds; (3) the City and/or CSURA will deliver to the Commission a fully executed copy of the guaranteed maximum price construction contract between the BID and its general contractor for the construction of the USAFA Visitor Center that has been reviewed and approved by the United States Government (the “Government”); and (4) the City and/or CSURA will deliver to the Commission a fully executed copy of a sublease between the USAFA Visitor Center Project Element Developer and the BID for the parcel of land designated for the purposes of developing and constructing the USAFA Visitor Center Project Element that has been reviewed and approved by the Government; and

WHEREAS, in adopting Resolution No. 3, as previously amended, the Commission deemed the USAFA Visitor Center Project Element to have commenced substantial work by the December 16, 2019 deadline subject to all of the conditions of approval listed in the immediately preceding recital obtaining by or before March 31, 2020; and

WHEREAS, if any of the conditions of approval listed in the second preceding recital failed to obtain by or before March 31, 2020, Resolution No. 3, as previously amended, provides that the Commission's approval of the USAFA Visitor Center Project Element is automatically modified without further action on the part of the Commission as follows: (1) the Minimum Element Allocation Percentage ("MEAP") of state sales tax increment revenue dedicated to the USAFA Visitor Center Project Element shall be reduced such that the amount of state sales tax increment revenue paid by the Colorado Department of Revenue ("Department") to the Special Fund controlled by the Financing Entity is as close to zero as possible; (2) the aggregate cap of \$120,500,000.00 shall be reduced by an amount equal to the remaining payments of Dedicated Revenue that will not be paid by the Department to the Special Fund; and (3) the City and CSURA shall be prohibited from utilizing any Dedicated Revenue in the flexible Sub-Account for the 16% MEAP to pay for any Eligible Costs of the USAFA Visitor Center Project Element; and

WHEREAS, in the midst of the City and CSURA's diligent efforts to fulfill all of the conditions of approval in Resolution No. 3, as previously amended, by or before March 31, 2020, the Governor of the State of Colorado verbally declared a disaster emergency due to the presence of coronavirus disease 2019 ("COVID-19") in Colorado on March 10, 2020, and the next day issued Executive Order D 2020 003 declaring a disaster emergency due to the presence of COVID-19 in Colorado; and

WHEREAS, the Governor's declaration of a disaster emergency in Colorado coincided with nationwide and worldwide declarations of disaster emergencies due to the COVID-19 pandemic, which in turn triggered significant turmoil in global, national, and local financial markets, including an usually high degree of bond market volatility, just as the BID was preparing to offer the Bonds for sale; and

WHEREAS, at the request of the City and CSURA, the Commission modified the condition of approval in Resolution No. 3, as previously amended, requiring the BID to issue at least \$65,185,000.00 in Bonds to support the USAFA Visitor Center and related master infrastructure improvements by the March 31, 2020 deadline by further extending the deadline through December 31, 2020 to allow the unusually high degree of bond market volatility to subside; and

WHEREAS, the disaster emergency due to the COVID-19 pandemic has persisted throughout 2020 and seemingly will continue for the foreseeable future as of the date hereof, and the BID has not been able to issue the Bonds during this emergency situation despite good faith efforts to do so;

WHEREAS, the City has extended its deadline for the BID to issue the Bonds by one year, to October 22, 2021 and, if necessary, will be required to extend the deadline by one year from that date;

WHEREAS, at the request of the City and CSURA, the Commission modified the conditions of approval in Resolution No. 3, as previously amended, requiring the BID to issue at least \$65,185,000.00 in Bonds to support the USAFA Visitor Center and related master infrastructure improvements by the December 31, 2020 deadline by further extending the deadline through December 31, 2021 to allow the BID additional time to market the Bonds and the

uncertainty in the market arising from the disaster emergency due to the COVID-19 pandemic to subside; and

WHEREAS, the uncertainty in the market arising from the disaster emergency due to the COVID-19 pandemic and associated new virulent strains has persisted throughout 2021 and has contributed to an increased cost of materials and required more capital investment to fully place Bonds that would support the USAFA Visitor Center and related master infrastructure; and

WHEREAS, the City requested that the Commission modify the conditions of approval in Resolution No. 3, as previously and hereafter amended, requiring the BID to issue at least \$65,185,000.00 in Bonds to support the USAFA Visitor Center and related master infrastructure improvements by the December 31, 2021 deadline by further extending the deadline through February 28, 2022 to allow the BID the remaining time needed to fully place and issue the Bonds; and

WHEREAS, if the Commission grants the City's request to further extend the deadline requiring the BID to issue at least \$65,185,000.00 in Bonds to support the USAFA Visitor Center and related master infrastructure improvements through February 28, 2022, subject to the other related conditions of approval as set forth in the January 7, 2022, then the Commission also may further amend Resolution No. 3, as previously amended, in conformity with the motion to be considered for approval on January 7, 2022, collectively attached hereto as Exhibit B, and collectively referred to hereinafter as "Resolution No. 3, as previously and hereafter amended", which provides that, if the BID fails to issue at least \$65,185,000.00 in Bonds to support the USAFA Visitor Center and related master infrastructure improvements by or before February 28, 2022, then the Commission's approval of the USAFA Visitor Center Project Element automatically will be modified without further action on the part of the Commission as follows: (1) the Minimum Element Allocation Percentage ("MEAP") of state sales tax increment revenue dedicated to the USAFA Visitor Center Project Element shall be reduced such that the amount of state sales tax increment revenue paid by the Colorado Department of Revenue ("Department") to the Special Fund controlled by the Financing Entity is as close to zero as possible; (2) the aggregate cap of \$120,500,000.00 shall be reduced by an amount equal to the remaining payments of Dedicated Revenue that will not be paid by the Department to the Special Fund; and (3) the City and CSURA shall be prohibited from utilizing any Dedicated Revenue in the flexible Sub-Account for the 16% MEAP to pay for any Eligible Costs of the USAFA Visitor Center Project Element; and

WHEREAS, the City and/or CSURA may in the future assert administrative, state, and/or federal causes of action, at law or in equity, related to their respective interests under the Act and/or Resolution No. 3, as previously and hereafter amended, which is attached hereto as Exhibit B, against the State of Colorado, including, without limitation, the Commission, the Office of Economic Development & International Trade, the Department, the Governor and/or his Office, Colorado Risk Management, and all current and former commissioners, employees, officials, agents, and attorneys of each of those entities (collectively referred to hereinafter throughout the entirety of this Agreement as, "the State"); and

WHEREAS, the Parties wish to avoid the expense and vagaries of litigation and, in exchange for the Commission allowing the City and CSURA to have until February 28, 2022 for the BID to issue at least \$65,185,000.00 in Bonds to support the USAFA Visitor Center and related

master infrastructure improvements, the City and CSURA are willing to waive and release all rights, claims, and remedies against the State for any act or omission arising out of or relating to the Commission's interpretation and implementation of the Act, including its powers and duties thereunder, and its later adoption of Resolution No. 3, as previously and hereafter amended, which is attached hereto as Exhibit B, on the terms set forth in this Agreement.

NOW THEREFORE, in consideration of the mutual and unilateral undertakings, covenants, obligations, promises, and warranties of the Parties, the legal sufficiency of which is hereby acknowledged, the Parties agree as follows:

AGREEMENT

OBLIGATIONS OF COLORADO SPRINGS AND CSURA RELATING TO THE USAFA VISITOR CENTER

1. **WAIVER.** In all respects relating to the USAFA Visitor Center, to the state sales tax increment revenue MEAP awarded to the USAFA Visitor Center, and to all actions that have been or will be taken by the State with respect to the USAFA Visitor Center, the City and CSURA, including the respective officials, employees, successors, agents, and assigns of each, each hereby waives and relinquishes all rights, claims, and remedies, which it has, or may have, at law or in equity, against the State, including, without limiting the generality of the foregoing, for any act or omission arising out of or relating to the Commission's interpretation and implementation of the Act, including its powers and duties thereunder, and its later adoption of Resolution No. 3, as previously and hereafter amended, which is attached hereto as Exhibit B. Specifically, but not by way of limitation, the City and CSURA each waives the right to seek specific performance against the State as a remedy for any of the following claims:

- Any claim under C.R.S. §§ 24-46-301, through -310, as currently enacted or subsequently amended.
- Any claim arising under any State statute, such as C.R.S. §§ 24-4-101, through -108.
- Any claim arising under any State rule of civil procedure, such as C.R.C.P. 106.
- Any claim seeking declaratory, injunctive, or other equitable relief.
- Any claim in tort, contract, or for violation of the covenant of good faith and fair dealing.
- Any other claim of any type whatsoever, arising out of federal law, the common law of any State, any State statute, any local law, or any administrative procedure or rule.

2. **RELEASE.** In all respects relating to the USAFA Visitor Center, to the state sales tax increment revenue MEAP awarded to the USAFA Visitor Center, and to all actions that have been or will be taken by the State with respect to the USAFA Visitor Center, the City and CSURA, including the respective officials, employees, successors, agents, and assigns of each, each hereby releases the State from any and all claims, causes of action, liabilities, expenses and/or damages which the City and CSURA may have or assert against the State as a result of any acts by the State which occurred before or after the effective date of this Agreement, or omissions by the State to perform acts which should have been performed before or after the effective date of this

Agreement, including, without limiting the generality of the foregoing, any act or omission arising out of or relating to the Commission's interpretation and implementation of the Act, including its powers and duties thereunder, and its later adoption of Resolution No. 3, as previously and hereafter amended, which is attached hereto as Exhibit B. Specifically, but not by way of limitation, the City and CSURA each releases the following claims:

- Any claim under C.R.S. §§ 24-46-301, through -310, as currently enacted or subsequently amended.
- Any claim arising under any State statute, such as C.R.S. §§ 24-4-101, through -108.
- Any claim arising under any State rule of civil procedure, such as C.R.C.P. 106.
- Any claim seeking declaratory, injunctive, or other equitable relief.
- Any claim in tort, contract, or for violation of the covenant of good faith and fair dealing.
- Any other claim of any type whatsoever, arising out of federal law, the common law of any State, any State statute, any local law, or any administrative procedure or rule.

3. COVENANT NOT TO SUE. In all respects relating to the USAFA Visitor Center, to the state sales tax increment revenue MEAP awarded to the USAFA Visitor Center, and to all actions that have been or will be taken with respect to the USAFA Visitor Center, the City and CSURA each further agrees and covenants that it has not and will not sue, or assert any administrative, state, or federal cause of action, at law or in equity, whether before a court of law or an administrative agency, against the State for any claims, causes of action, liabilities, expenses and/or damages arising out of any acts by any of them which occurred before or after the effective date of this Agreement, or omissions by any of the State to perform acts which should have been performed before or after the effective date of this Agreement, including, without limiting the generality of the foregoing, any act or omission arising out of or relating to the Commission's interpretation and implementation of the Act, including its powers and duties thereunder, and its later adoption of Resolution No. 3, as previously and hereafter amended, which is attached hereto as Exhibit B.

4. SOLE OWNER OF CLAIMS. In all respects relating to the USAFA Visitor Center, to the state sales tax increment revenue MEAP awarded to the USAFA Visitor Center, and to all actions that have been or will be taken by the State with respect to the USAFA Visitor Center, the City and CSURA each represents and agrees that it is the sole owner of its respective claims purported to be released hereby, that it has not assigned or transferred any such claim against the State to any third party before the effective date of this Agreement, and that it will not assign or transfer any such claim against the State to any third party after the effective date of this Agreement. The City and CSURA each further represents and warrants that no third party is subrogated to its interest in those claims released hereby, including but not limited to insurers, parent companies or subsidiaries subrogated by reason of payment of costs or expenses, or, if any third party has been subrogated to its interest in such claims, the interest of any subrogee has been settled, compromised and extinguished. To the extent permitted by law, the City and CSURA each agrees to defend and indemnify the State from such claims released hereby and hold the State harmless against such claims if held by any assignee or subrogee.

5. OPEN RECORDS ACT AND OTHER RELEASES PROVIDED BY LAW. The City and CSURA each understands and agrees that upon a valid request made pursuant to applicable open records laws, including, without limitation, the provisions of the Colorado Open Records Act, § 24-72-101, *et seq.*, C.R.S. (2021), as presently enacted or subsequently amended, the State is obligated to provide the requesting person a copy of this Agreement. The City and CSURA each agrees that it will not hold the State liable for any public disclosure of this Agreement in compliance with applicable law.

6. ATTEST AND ACKNOWLEDGMENT OF AMENDED RESOLUTION NO. 3. After this Agreement has been fully executed by all Parties, and the Commission has adopted Resolution No. 3, as previously and hereafter amended, which is attached hereto as Exhibit B, counsel to the Commission and OEDIT and OEDIT staff may consolidate any amendments to Resolution No. 3 that were previously adopted by the Commission on and before January 7, 2022 into a written Amended Resolution No. 3 for adoption by the Commission *nunc pro tunc* at a later meeting. In such event, the City and CSURA each agree that their respective authorized signatories will execute the “ATTEST AND ACKNOWLEDGEMENT” portions of Amended Resolution No. 3 without delay.

OBLIGATIONS OF THE STATE OF COLORADO

7. ADOPTION OF RESOLUTION NO. 3, AS PREVIOUSLY AND HEREAFTER AMENDED. After this Agreement has been fully executed by all Parties, the Commission will adopt Resolution No. 3, as previously and hereafter amended, which is attached hereto as Exhibit B, on January 7, 2022.

GENERAL PROVISIONS

8. NO ADMISSION OF LIABILITY. By entering into this Agreement, the Parties do not admit to any impropriety, wrongdoing, or liability of any kind whatsoever, but are entering into this Agreement in compromise of any claims, causes of action, liabilities, expenses and/or damages arising out of any acts which occurred before the effective date of this Agreement, or omissions which should have been performed before the effective date of this Agreement, including, without limiting the generality of the foregoing, any act or omission arising out of or relating to the Commission’s interpretation and implementation of the Act, including its powers and duties thereunder, and its later adoption of Resolution No. 3, as previously and hereafter amended, which is attached hereto as Exhibit B. The Parties agree that this Agreement does not constitute evidence of, or an admission of any liability, omission, or wrongdoing of any kind by the Parties. This Agreement shall not be offered or received into evidence or otherwise filed or lodged in any proceeding against a Party except as may be necessary to prove and enforce its terms.

9. INTEGRATION. The Parties understand, acknowledge and agree that this Agreement constitutes the entire agreement of the Parties regarding the subject matter and transactions referred to herein. The Parties understand, acknowledge and agree that the terms of this Agreement are contractual in nature and not mere recitals. As such, the Parties understand,

acknowledge and agree that this Agreement is fully integrated and supersedes all previous oral or written agreements of the Parties.

10. BINDING EFFECT. This Agreement shall inure to the benefit of, and be binding upon, the successors, assigns, and heirs of the Parties.

11. NO THIRD PARTY BENEFICIARY RIGHTS. No person or entity not a Party to this Agreement is an intended beneficiary of this Agreement, and no person or entity not a Party to this Agreement shall have any right to enforce any term of this Agreement.

12. GOVERNING LAW. This Agreement is entered into in the State of Colorado, and shall be governed by the laws of the State of Colorado.

13. HEADINGS. The headings used in this Agreement are for the convenience of the Parties only. As such, these headings shall not have any legal effect whatsoever or, in any other way alter or modify the meaning or interpretation of the substantive terms of this Agreement.

14. ADDITIONAL ASSURANCES. This Agreement is intended to be self-operative. Notwithstanding the foregoing, the Parties agree that, at the reasonable request of the other party, they shall execute any further documents or instruments reasonably necessary to effectuate the transactions contemplated by this Agreement, including specifically Resolution No. 3, as previously and hereafter amended, which is attached hereto as Exhibit B.

15. SEVERABILITY. If any provision of this Agreement is declared unenforceable by a court of competent jurisdiction, then the remaining provisions of this Agreement shall continue to be binding upon the Parties.

16. COSTS. The Parties agree that each Party shall bear its own costs and attorney fees, if any.

17. EXECUTION IN COUNTERPARTS OR BY FACSIMILE. This Agreement may be executed in counterparts or with signatures obtained via facsimile or email transmission, each of which shall have full force and effect upon execution by all Parties to this Agreement.

18. VALIDITY/EFFECTIVE DATE. This Agreement shall not be deemed valid until it has been signed by the Commission's Chair at the direction of a majority of a quorum of commissioners. The effective date of this Agreement is the date that it is signed by the Commission's Chair at the direction of a majority of a quorum of commissioners.

19. WARRANTIES. The Parties expressly warrant that they have carefully and completely read the terms of this Agreement. The Parties expressly warrant that they have had the opportunity to consult with legal counsel before executing this Agreement, that they fully understand the terms of this Agreement, and that they enter into this Agreement knowingly and voluntarily, and without coercion, duress or undue influence. The Parties expressly warrant that their respective signatories each has full authority to act in signing this Agreement. The Parties expressly acknowledge that they believe the terms of this Agreement are appropriate to reach a full and final resolution of this matter. The Parties expressly understand and agree that the signing of this Agreement shall be forever binding, and no rescission, modification or release of the Parties

from the terms of this Agreement will be made for mistake or any other reason. The Parties represent that they are legally competent to execute this Agreement and accept full responsibility and assume the risk of any mistake of fact as to any damages, losses, or injuries, whether disclosed or undisclosed, sustained as a result of any act or omission arising out of or relating to the Commission's interpretation and implementation of the Act, including its powers and duties thereunder, and its later adoption of Resolution No. 3, as previously and hereafter amended, which is attached hereto as Exhibit B, any claim brought or which could have been brought, or any other matter between the Parties occurring up to the effective date of this Agreement. The Parties further warrant and acknowledge that no promise or inducement has been offered except as set forth herein and that this Agreement was executed by them without reliance upon any statement or representation by the persons or Parties released or their representatives concerning the nature or extent of any damages or any legal liability therefore. The Parties acknowledge that entering into this Agreement is not an admission by any Party of any wrongful or improper action, but rather reflects the Parties' mutual desire to resolve this matter amicably and without additional expense or litigation.

20. AMENDMENT. This Agreement may not be amended except in a writing setting forth such amendment and executed by all Parties.

21. ENFORCEABILITY. The Parties expressly acknowledge that this Agreement shall be governed by the laws of the State of Colorado and shall be enforceable in accordance with its terms only in Colorado state courts of competent jurisdiction. Court jurisdiction and venue for any disputes arising out of this Agreement shall exclusively be in the Denver District Court for Colorado's Second Judicial District.

CAUTION: THIS IS A RELEASE. READ BEFORE SIGNING.

WHEREFORE, the Parties agree to and do accept the terms of this Agreement.

**CITY OF COLORADO SPRINGS,
COLORADO**

DATE


By: John W. Suthers
Mayor

ATTEST: _____

By: Sarah B. Johnson
City Clerk

**COLORADO SPRINGS URBAN
RENEWAL AUTHORITY**

DATE



By: Randle W. Case, II
Chair, Board of Commissioners

ATTEST: _____

By: Jariah Walker
Board Secretary

**COLORADO ECONOMIC
DEVELOPMENT COMMISSION**

DATE

By: Carrie Schiff, Chair