

DONATION AND INDEMNITY AGREEMENT

THIS DONATION AND INDEMNITY AGREEMENT (“Agreement”) is made and entered into as of the _____ day of _____ 2019 (“Effective Date”) by and between **TOMAS PAXTON** (“Owner”), **ORANGE CAPITAL ADVISORS, LLC**, a South Carolina limited liability company, including its successors and assigns (“Orange Capital”) and **THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH**, a municipal corporation existing under the laws of the State of Georgia (“City”); collectively the “Parties.”

WITNESSETH:

WHEREAS, Owner is the owner of certain real property consisting of 22 acres, more or less, and being more specifically described in Exhibit A attached hereto and incorporated herein by reference (“Property”);

WHEREAS, Orange Capital to the extent that Owner and Orange Capital close the transaction contemplated by that certain Commercial Purchase and Sale Agreement, dated February 19, 2019, as may be and has been amended from time to time (the “PSA”) will be the owner of the property and desires to develop the Property for mixed use commercial and mixed-use residential purposes, together with open space and public space for the use and benefit of the Property and the general public (“Project”);

WHEREAS, City is the owner of the Gwinnett Street right-of-way adjoining the Property and also owns other nearby properties, and City is planning to imminently widen and improve Gwinnett Street and develop its nearby properties as part of the planned Arena and Canal District projects; and

WHEREAS, Owner, Orange Capital and City (collectively, the “Parties”) desire that the Project be developed.

NOW THEREFORE, for and in consideration of the agreements set forth herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the City, Owner, and Orange Capital agree as follows:

1. Project. Orange Capital intends to develop the Property as a planned development consistent with the previously City approved Civic Masterplan (the “Civic Master Plan”). The parties agree that by following such Civic Master Plan, there will be a comprehensive and predictable land planning guide for the future development of the Project.

2. Gwinnett Street Condemnation; Street Improvements. City and Orange Capital acknowledge that City needs to acquire additional fee simple right-of-way and easements from Owner and/or Orange Capital to facilitate the widening of Gwinnett Street (the “Gwinnett Street Widening project”). In connection therewith, the parties agree as follows:

- (a) Owner will donate property needed by the City at no cost to City no later than September 1, 2019, free and clear of liens; said parcels to include fee simple right-

of-way and easements as more particularly shown and described on Exhibit B and as follows:

- i. Fee Simple Right-of-Way. The fee simple right-of-way is subject to survey but is generally described as the additional required pavement improvement area that will extend from the existing end of pavement outward as shown and described on Exhibit C. Such conveyance shall be evidenced by a limited warranty deed in a form acceptable to the Parties
 - ii. Easement. An easement is needed for construction, slope, maintenance, drainage, environmental remediation, and utilities across lands necessary for construction, grading and fill or storm water and utility conveyance as shown and described in Exhibit D. Owner or Orange Capital, as applicable, will grant to the City an easement for those items described herein, but shall retain the right to relocate and modify such City improvements and easements so granted at its sole cost and expense, as long as such relocation and/or modification does not impair the ability for Gwinnett Street to function as designed by the City.
- (b) Environmental Remediation. In connection with ownership of the Property and development of the Project, the Parties recognize the importance of certain environmental remediation on the Property.
- i. Orange Capital, upon acquisition of the Property from Owner, but no later than November 1, 2019 (the “Commencement Deadline”), agrees to commence certain environmental remediation such as certain excavation and removal of the underground storage tanks, contaminated soils, and related recognized environmental conditions if any within the proposed right-of-way and easement areas identified in Section 2(a) (the “Remediation Work” as described above); said conditions noted in the Phase 1 (dated March 12, 2019 and addendum May 15, 2019) and Phase 2 (dated May 28, 2019) environmental site assessments conducted by CARDNO for City. Said Remediation Work shall be completed by Orange Capital no later than February 1, 2020. In addition, Orange Capital may cause to be performed separate and independent environmental site assessments, work plans and other reports, tests, plans and documentation and shall perform any additional actions which may be required by the Georgia Department of Environmental Protection and/or the City as such actions are identified in an agreement to be entered into by and between (among) Orange Capital, EPD and the City establishing the Remediation Work (and scope thereof) as may be required and in connection with acceptance of the Property (and Project) into the Brownfields Program as contemplated under the Georgia Brownfields Act and which Orange Capital may deem necessary to protect itself from any liability and responsibility relating to, arising from or in connection with any previously existing or prior contamination, hazardous materials or environmental conditions existing on the Property prior to acquisition by

Orange Capital. In the event that Orange Capital does not acquire the Property before the Commencement Deadline, then Owner shall be required to commence and complete the Remediation Work and other obligations described herein rather than Orange Capital.

- ii. In the event Orange Capital or the Owner (if Orange Capital does not acquire the Property before the Commencement Deadline), fails to commence the Remediation Work by the Commencement Deadline or complete the Remediation Work by February 1, 2020, then the City may exercise a self-help remedy to commence and/or complete the Remediation Work identified in Section 2(b)(i) within the proposed right-of-way and easement areas identified in Section 2(a).
- iii. **INDEMNITY AGREEMENT:** In the event the City exercises such self-help remedy, then Orange Capital or the Owner (if Orange Capital does not acquire the Property before the Commencement Deadline), will indemnify and hold harmless the City for the actual costs incurred by the City associated with the Remediation Work identified in Section 2(b)(i) within the proposed right-of-way and easement areas identified in Section 2(a); said reimbursement not to exceed \$500,000 (collectively the “Indemnity Obligations”). The City shall be reimbursed by Orange Capital or the Owner (if Orange Capital does not acquire the Property before the Commencement Deadline) within eighteen (18) months of notice to the Orange Capital or the Owner (if Orange Capital does not acquire the Property before the Commencement Deadline) of the actual costs incurred by the City to exercise such self-help remedy. Failure to reimburse the City timely shall constitute a default under this Agreement and shall permit the City to pursue all remedies provided for in law and in this Agreement, including, without limitation, the right to foreclose under the Security Deed after the expiration of eighteen (18) months from the date of such notice and failure to cure such default. Such notice provision of eighteen (18) months shall only apply to a default for failure to reimburse the City timely as required in the Indemnity Obligations, but shall not apply to other defaults, such as unauthorized transfers, failure to pay real estate taxes, and other obligations described herein and in the Security Deed. Such Indemnity Obligations to indemnify the City shall be secured by the Property as further described in Section 2(b)(iv).
- iv. At the closing on the donation, Owner and Orange Capital will enter into a security deed in form as attached on Exhibit G (the “Security Deed”), which will serve as security for City to recover its remediation costs in the event either Owner or Orange Capital do not indemnify and reimburse the City as contemplated herein and in the Contribution and Indemnity Agreement. Both Owner and Orange Capital acknowledge and agree that if the City must perform the Remediation Work, then City will record the Security Deed in the public records as a lien against the property in the amount of up to \$500,000.00; provided however, that the City may only

recover by foreclosure of the Security Deed the actual remediation costs incurred not to exceed \$500,000.00. All bids for such work and costs incurred by the City shall be negotiated and incurred in an objective manner such that the final cost for the Remediation Work be competitively procured and done so in a way so as to not simply allow the contractor to work toward an allowance of some sort. Said lien will be released upon reimbursement payment in full by Owner or Orange Capital to the City. Upon such reimbursement payment, the City shall assign to the payor of such reimbursement payment any and all tax benefits attributable to performing the Remediation Work. Orange Capital and/or Owner waives any defense or claim that the Security Deed is not valid due to signing such Security Deed prior to ownership of the Property and consents to the City dating said Security Deed and making it effective as of the date deemed necessary by the City, which includes the date it is recorded. In the event that on or before the Closing of the Property between Owner and Orange Capital a Five Hundred Thousand and No/100 Dollar (\$500,000.00) Escrow Deposit is deposited and held by an escrow agent consented to by the City pending completion of the Remediation Work and other obligations described herein, the City agrees to release the Security Deed on the Property in exchange for such escrowed funds being held by the escrow agent to reimburse the City. The escrowed funds will be held subject to an escrow agreement mutually agreeable by the City and Orange Capital and shall be executed by the escrow agent, Orange Capital and other parties deemed necessary by the City. The escrow agreement will provide that the escrow funds will be paid and released to the City upon submission of the final costs by the City of the Remediation Work if the City exercises its self-help remedy.

- v. Owner acknowledges and agrees that this Agreement shall be binding upon, and shall inure to the benefit of the successors or assigns of the parties, and shall run with the Property and be binding upon and inure to the benefit of any person, firm or corporation that may become the successor in interest, directly or indirectly, to the Property, or any portion thereof. Therefore, so long as this Agreement is binding and the Remediation Work has not be completed (with all expense reimbursed to the City if the City exercised its self-help remedy), then Owner agrees that prior to any conveyance of the Property to any grantee not a Party to this Agreement, that Owner shall obtain the written consent of the City and shall have such grantee execute the Contribution and Indemnity Agreement and Security Deed. In the event Owner conveys the Property without complying with the terms of this section of the Agreement, Owner agrees to pay to the City the sum of \$500,000.00. Owner and the City acknowledge that the injuries to City caused by any such failure by Owner to comply with this term of the Agreement would be difficult, if not impossible, to determine with a reasonable degree of accuracy, and in recognition of their mutual intent to provide for damages in such an event, have determined the aforementioned sum to be a reasonable

estimate at the time of this Agreement of the probable loss that would be sustained by Owner in the event of such a default by Owner. This sum is not to be construed in any sense as a penalty. Furthermore, notwithstanding the aforementioned, Owner acknowledges and agrees that if a Security Deed has been recorded by the City, then the City must be fully paid and reimbursed to cancel said Security Deed unless the escrow account provided for in Section 2(b)(iv) has been established in lieu of such security.

3. Traffic Flow, Streetscape and Tax Treatment. In exchange for the donation described in Section 2, the City agrees (i) to extend the street scape (trees, lighting and median) in a manner similar to the streetscape located on the opposite side of the I-16 underpass, and the improvements to be constructed by the City shall run for the entire frontage of the Project to the Canal; (ii) to design (or if designed by Orange capital to approve such designs for) the Gwinnett Street Widening Project such that it provides for a left in movement turn and traffic flow (from Gwinnett Street moving east to west), so as to allow traffic to enter the Property from Gwinnett Street regardless of from which direction such traffic is flowing to the center of the Project as more particularly shown and described on the Civic Master Plan attached hereto as Exhibit E; provided, however, Orange Capital will incrementally increase the land being donated to the City as reasonably necessary to accommodate this new movement (e. g. turn lanes accommodating same); (iii) to support creative lighting and branding (or, in the alternative, to assist and promote Orange Capital in obtaining permission) on the underpass as recommended in previous studies performed for the Gwinnett Street corridor and the Canal District as contemplated by the Civic Master Plan; (iv) to release of any rights or claims on the drainage ditch at the front (along Gwinnett Street) of the subject property as shown in Exhibit E; and (v) release of any rights, claims and tax map identification number upon execution of a quit claim deed by Owner for the piece found in the center of the property as shown in Exhibit F.

The Parties shall mutually agree on the design and location of the entrance from Gwinnett Street to the Project noted and City and Orange Capital shall work in good faith to obtain approval from the City and all other applicable governmental authorities with approval authority thereover for the improvements described in Section 3 herein.

The benefits described herein Section 3 shall accrue to the property and transfer to Owner and future owners upon consummation of the Donation.

4. Utility Easement. City currently enjoys a utility and access easement along the westerly twenty-five (25) feet of the Property adjoining the Springfield Canal. There are currently City utilities located within this easement. City hereby grants Owner and/or Orange Capital the right to relocate this easement and utilities, as well as expand the canal onto Owner's property for purposes of satisfying flood plain mitigation requirements and work associated with any utility relocation, all at the cost of Owner and/or Orange Capital unless the Parties mutually agree on an alternative cost sharing arrangement. Such work is subject to approval of plans by the City and no interruption of service; said approval not to be unreasonably withheld.

5. Due Diligence. The parties shall use reasonable diligence to perform the work described herein but shall not be liable to each other, or their successors or assigns, for damages, costs, attorneys' fees, reasonably and actually incurred (including costs or attorneys' fees on appeal) for breach of contract, or otherwise, for failure, suspension, diminution, or other variations of services occasioned by any caused Force Majeure. As used herein, "Force Majeure" shall mean any event that causes an increase in time and/or cost of construction of the Project, if and so long as such event is caused by natural disaster, fire, earthquake, floods, explosion, extraordinary adverse weather conditions, declared or undeclared war, terrorism, riots, protests, mob violence, inability to procure or a general shortage of labor, equipment, facilities, energy, materials or supplies in the open market, failure of transportation, unforeseen physical conditions, strikes, lockouts, actions of labor unions, condemnation, court orders, laws, rules, regulations, orders of governmental or military authorities or any event of force majeure customarily found in construction contracts used in the building construction industry in the vicinity of the Project and actually contained in Orange Capital's contract with its general contractor, so long as such cause is not within the control of the party undertaking same.

6. Conditions Precedent to Close: The following are conditions that must be satisfied prior to closing on the donation:

- (a) A restriction for the use of Lot 101 of the Property as a park shall be removed by the appropriate governmental authorities. Satisfactory evidence must be provided to the parties that is sufficient to have such restriction removed as an exception (or affirmative coverage is provided to insure and provide coverage that such restriction does not apply) on a title insurance commitment for Orange Capital.
- (b) A quitclaim deed from the City shall be approved and recorded with respect to that certain encroachment shown and described as the "Center Ditch" on that certain plat recorded at Plat Book 19 - P, page 85 ("Plat").
- (c) A quitclaim deed from the City shall be approved and recorded with respect to that certain encroachment shown and described as the "Radio Tower" on the Plat. City will further cooperate with Owner and Orange Capital to remove the Radio Tower as a separate parcel of record with its own property identification number so that for all purposes the Radio Tower parcel shall be deemed a part of the Property identified as PIN No. 2-0046-08-001-L.

In the event any of the foregoing conditions are not satisfied or waived in writing by the Parties on or before September 2, 2019, then Owner, Orange Capital, and City shall have the right to terminate this Agreement and, upon such termination, this Agreement shall be null and void, and of no further force and effect.

7. Outside Date. In the event the donation of the Property has not consummated and the donation property has not been conveyed to City on or before 5:00 p.m. on September 2, 2019 (the "Outside Date"), then this Agreement shall terminate, be null and void, and of no further force or effect. The city shall have the option of extending

the Outside Date by three (3) thirty day periods upon providing Owner with written notice before September 2, 2019.

8. Agency. Owner, Orange Capital and the City, and their respective agents, contractors or subcontractors, shall perform all activities that are outlined in this Agreement as independent entities and not as agents of each other.

9. Binding Nature of Agreement. This Agreement shall be binding upon, and shall inure to the benefit of the successors or assigns of the parties, and shall run with the Property and be binding upon and inure to the benefit of any person, firm or corporation that may become the successor in interest, directly or indirectly, to the Property, or any portion thereof.

10. Controlling Laws:

(a) This Agreement and provisions contained herein shall be construed, controlled, and interpreted according to the laws of the State of Georgia and all duly adopted ordinances, regulations, and policies of the City now in effect and those hereinafter adopted. Unless otherwise specified in this Agreement for particular issues, all the City ordinances, rules, regulations and policies are applicable.

(b) The location for settlement of any and all claims, controversies, or disputes, arising out of or relating to any part of this Agreement, or any breach hereof, shall be Chatham County, Georgia.

11. Miscellaneous:

(a) Entire Agreement. There are no other agreements or understandings, either oral or written, between the parties affecting this Agreement or the subject matter covered by this Agreement, except as otherwise specifically provided for or referred to herein. This Agreement cancels and supersedes all previous agreements between the parties relating to the subject matter covered by this Agreement. No change or addition to, or deletion of, any portion of this Agreement shall be valid or binding upon the parties hereto unless the same is approved in writing by the parties.

(b) No Assignment. This Agreement is a contract for specialized services and is personal to the parties, and shall not be assignable in whole or in part by a party without the prior written consent of the other party, which consent shall not be unreasonably withheld. Any attempted assignment without prior written consent shall be void and of no force or effect. Notwithstanding the foregoing, Orange Capital intends to assign all of its rights and obligations under the PSA, this Agreement and various other rights and obligations and documents evidencing same in connection with the acquisition of the Property and development of the Project and the Parties hereto acknowledge and consent to same; provided, Orange Capital does the following before such assignment: (i) the proposed assignee must sign a security deed in the form attached hereto as Exhibit G, (ii) the proposed assignee must agree to be bound by the terms of the Donation and Indemnity Agreement and execute such documents as requested by the City to evidence

being bound by the Indemnity Obligations, and (iii) the City must approve such assignment, not to be unreasonably withheld. Orange Capital shall provide written evidence of such assignment and assignee's written assumption of same. This Agreement shall be binding upon and inure to the benefit of the parties and their successors and permitted assigns.

(c) Waiver; Time. No waiver or breach of any provision of this Agreement shall be construed to be a waiver of any breach of any other provisions of this Agreement or any succeeding breach of the same provision. No delay in acting with regard to any breach of any provision of the Agreement shall be construed as a waiver of such breach. Time is of the essence in the performance of the terms and provisions of this Agreement.

(d) Captions and References; Interpretation. The captions and paragraph headings in this Agreement are for ease of reference only and are not intended to limit, describe, supplement or be part of this Agreement. Any reference in this Agreement to "Section" or "Exhibit" shall refer to the corresponding Section or Exhibit of this Agreement, unless otherwise expressly indicated. Whenever the context may require, any pronouns used in this Agreement shall include the corresponding masculine, feminine, or neuter forms, and the singular form of nouns shall include the plural and vice versa. Whenever the word "including" is used, it shall have the same meaning as "including but not limited to" and "including without limitation." Any reference in this Agreement to "herein" or "hereof" shall refer to this Agreement as a whole rather than being limited to the particular section or subsection in which such term is used.

(e) Severability. In the event that any court of competent jurisdiction determines that any provision of this Agreement is invalid or unenforceable, such provision shall be deemed an independent provision and such determination shall not affect the validity or enforceability of any other provision of this Agreement, which shall remain in full force and effect and which shall be construed as to be valid and enforceable under applicable law.

(f) Notices. Any notice required or allowed to be delivered hereunder shall be in writing and be deemed to be delivered when (i) hand delivered to the person hereinafter designated, (ii) upon receipt as evidenced by delivery receipt if sent by a national overnight delivery service, or (iii) upon receipt of such notice when deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, addressed to a party at the address set forth opposite the party's name below, or at such other address as the applicable party shall have specified, from time to time, by written notice to the other party delivered in accordance with:

If to City:	City of Savannah Attention: City Manager City Hall 2 East Bay Street Savannah, GA 31401 Facsimile: (912) 238-0872
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with a copy to: City Attorney
Office of the City Attorney
P.O. Box 1027
Savannah, GA 31402
Facsimile: (912) ____ - ____

With a copy to: Director of Real Estate
Real Estate Services Department
City of Savannah
P.O. Box 1027
Savannah, GA 31402
Email: dkeating@savannahga.gov

If to Orange Capital: Orange Capital Advisors
Attention: Mr. McFaddin Blanding
125 Regional Parkway
Suite 200
Orangeburg, SC 29118
Email: mblanding@orangecapital.net
Facsimile: (803) 531-4629

with a copy to: Hunter Maclean
Attention: Harold B. Yellin, Esq.
200 East Saint Julian Street
Savannah, GA 31412
HYellin@HunterMaclean.com
Facsimile: (912) 236-4936

additional copy to: Glen P. Caulk
Nelson Mullins Riley & Scarborough LLP
1320 Main Street, 17th Floor, Meridian Building
Columbia, SC 29201
glen.caulk@nelsonmullins.com

If to Owner: Attention: Tomas Paxton
P. O. Box 9242
Savannah, GA 31412
(912) 232-3050
Email: gwinnett.west@gmail.com

with a copy to: Nash Law Firm, P.C.
Attention: Thomas A. Nash, Jr. Esq.
340 Eisenhower Drive, Suite 800
Savannah, GA 31406

(912) 527-7000
Email: tnash@nashlawfirm.com

The Parties may provide notice to one another by electronic mail or facsimile to the addresses or numbers above; however, the time and date of delivery shall be the (x) time and date when such notice is delivered using method (i), (ii) or (iii) as applicable; or (y) when the recipient of the electronic mail or facsimile acknowledges in writing (whether by electronic mail, facsimile or otherwise) receipt and expressly waives delivery by methods (i), (ii) and (iii) in each such instance.

(g) Exhibits. The following exhibits are attached hereto and incorporated by this reference herein:

- Exhibit A: Tax Map Identification Number & Survey
- Exhibit B: Gwinnett Street Widening Project
- Exhibit C: Gwinnett Street Widening Right-of-Way
- Exhibit D: Gwinnett Street Widening Easement
- Exhibit E: Access
- Exhibit F: Drainage Ditch
- Exhibit G: Security Deed

IN WITNESS WHEREOF, the parties hereto have executed this Agreement under seal as of the day and year first above written.

OWNER

By: _____

Name: _____

Title: _____

ORANGE CAPITAL, LLC, a South Carolina limited liability company

By: _____

Name: _____

Title: _____

CITY OF SAVANNAH, a Georgia municipal corporation

By: _____

Name: _____

Title: City Manager