

AVAILABILITY OF FUNDS AND STEP-IN RIGHTS AGREEMENT

This **AVAILABILITY OF FUNDS AND STEP-IN RIGHTS AGREEMENT** (“**Agreement**”) is made and entered into this ____ day of June 2023, by and among **PEAK METROPOLITAN DISTRICT NO. 3**, a quasi-municipal corporation and political subdivision of the State of Colorado (the “**District**”), **CITY OF COLORADO SPRINGS**, a Colorado municipal corporation and home rule city by and through its enterprise, the Colorado Springs Municipal Airport (the “**Airport**”), and **PEAK INNOVATION, LLC**, a Delaware limited liability company (the “**Owner**”) (each a “**Party**”, and collectively, the “**Parties**”).

RECITALS

A. The Airport owns certain real property located in the City of Colorado Springs, Colorado (the “**City**”), Colorado, and developing thereon a phased mixed-use business park commonly known as Peak Innovation Park (the “**Project**”).

B. The Project is within the boundaries of the District.

C. The District was organized pursuant to a Consolidated Service Plan approved by the City Council for the City of Colorado Springs on August 28, 2018, as amended by that First Amendment to the Consolidated Service Plan approved on February 12, 2019, and as amended by that Second Amendment to the Consolidated Service Plan approved on March 22, 2022 (as it may be further amended or restated from time to time, the “**Service Plan**”), for the purpose of providing certain public improvements and services to and for the benefit of properties within the service area of the District.

D. The Service Plan authorizes the District to, among other things, finance and construct certain public improvements, including but not limited to, water, sanitation, street, safety protection, park and recreation, public transportation, and mosquito control improvements as more generally described in the Service Plan (the “**Public Improvements**”).

E. The Public Improvements are necessary for the development of the Project.

F. The Airport and the District entered into that certain Public Improvement Intergovernmental Agreement dated _____, 2023 (the “**Peak IGA**”), whereby, among other things, the Airport delegated to the District, and the District has agreed, either directly or with the efforts and cooperation of the District Developer (as defined below) and other service providers, to cause the design and construction of Public Improvements serving the Project.

G. The District and UFCS Airport, LLC, a Colorado limited liability company (the “**District Developer**”) entered into that certain Facilities Acquisition and Payment Agreement dated November 30, 2022 (as may be amended from time to time, the “**Developer Acquisition Agreement**”), whereby the District Developer agreed, on behalf of the District, to cause through third party contracts with engineers, surveyors, contractors, consultants and other construction professionals, the construction, completion and funding of certain Public Improvements and, to the extent the requirement of the Developer Acquisition Agreement are met, the District will reimburse the District Developer for the Construction Costs (as such term is defined in the

Developer Acquisition Agreement) associated with the Public Improvements in accordance with the terms therein.

H. Concurrently herewith, Owner has purchased from the Airport certain property within the boundaries of the District, as more fully described on **Exhibit A** attached hereto and incorporated herein by reference (the “**Owner Property**”).

I. In conjunction with the Owner’s purchase of the Owner Property, the Airport and the Owner entered into that certain Development Agreement dated _____, 2023 (as may be amended, modified, restated and supplemented from time to time, the “**Owner Development Agreement**”) which, in part, describes the obligation of the Airport to cause the installation of certain offsite improvements, which such offsite improvements are more particularly described on **Exhibit B** attached hereto and incorporated herein by this reference (the “**Offsite Improvements**”). Certain Offsite Improvements may qualify as eligible Public Improvements under the Peak IGA and the Developer Acquisition Agreement (hereinafter, such eligible Public Improvements shall be referred to herein as the “**District Improvements**”).

J. In order for the Owner Property to be developed and utilized, the District Improvements need to be constructed.

K. Funds related to the design, testing, engineering, and construction of the District Improvements, together with the related consultant fees associated with the construction of the District Improvements, have been and/or will be subject to payment and/or reimbursement by the District to construct the District Improvements (“**Construction Related Expenses**”). Estimates of the Construction Related Expenses related to the District Improvements are indicated on the attached **Exhibit C**.

L. The District has agreed to reimburse the District Developer for the Construction Related Expenses associated with the District Improvements in accordance with the Developer Acquisition Agreement.

M. The District has issued its Limited Tax General Obligation Bonds, Series 2022A-1 in the principal amount of \$18,250,000 (the “**2022A-1 Bonds**”) and its Limited Tax General Obligation Convertible Capital Appreciation Bonds, Series 2022A-2 in the initial principal amount of \$45,530,552 (the “**2022A-2 Bonds**” and with the 2022A-1 Bonds, the “**Bonds**”) for the purpose of, among other things, funding and reimbursing a portion of the costs associated with construction and installation of Public Improvements that benefit the property within the service area of the District and the District is willing to utilize proceeds from the Bonds for construction and/or acquisition of the District Improvements and payment of Construction Related Expenses in accordance with the Developer Acquisition Agreement and the terms and provisions of this Agreement.

N. Owner has requested assurances from the District and the Airport that the District Improvements will be completed in accordance with the terms of the Owner Development Agreement.

O. It is in the best interests of the taxpayers and inhabitants in the District's service area that the District Improvements be constructed.

P. The Parties now desire to enter into this Agreement in order to set forth the terms and conditions under which the District and the Airport will provide assurances to Owner that the District Improvements will be constructed upon an agreed upon deadline and sets forth the conditions upon which Owner will be permitted to step-in and manage the completion of the District Improvements, if required, together with such other matters as are set forth hereinafter.

Q. The District, the Airport and the Owner desire to acknowledge the appropriation of the proceeds of the Bonds to pay the Construction Related Expenses associated with the District Improvements.

R. Any capitalized term used but not defined herein shall have the meaning given such term in the Owner Development Agreement.

NOW, THEREFORE, in consideration of the foregoing and the respective agreements of the Parties contained herein, the Parties agree as follows:

COVENANTS AND AGREEMENTS

1. Incorporation of Recitals. The Parties hereby acknowledge and agree to the Recitals set forth above, which are incorporated herein by this reference.

2. District Improvement Funding. The Parties estimate the total cost of the District Improvements to be approximately \$14,075,680.00 ("**District Improvement Costs**"). The final budget for the District Improvement Costs ("**Final Budget**") as may be amended from time to time ("**Amended Budget**"), will be attached as an exhibit to any amendment to the Owner Development Agreement. Any Amended Budget will also be provided to the District. As a result of the District's issuance of the Bonds, the District appropriated and has funds currently on deposit to fund the District Improvements in excess of the Final Budget as of the date hereof (the "**District Project Funds**"). The District will use the District Project Funds as needed to pay the Construction Related Expenses, or to reimburse the District Developer or Owner (relative to any Step-In Right Work (as defined below)) for Construction Related Expenses, in accordance with the Agreement or with the procedures set forth in the Developer Acquisition Agreement, as applicable.

3. Construction Contracts and Performance. The Airport hereby confirms its delegation of the Airport's construction obligations with respect to the District Improvements to the District in accordance with the terms of the Peak IGA. The District hereby agrees to instruct the District Developer to proceed with construction of the District Improvements and pursue construction of the District Improvements to completion in accordance with the terms of the Owner Development Agreement. The Parties hereby acknowledge that each have received and reviewed the terms and conditions of the Owner Development Agreement and a true and complete copy thereof is attached to this Agreement as Exhibit C.

4. Owner Step-In Rights. In accordance with the terms of this Agreement, the Airport and the District agree to grant the following step-in rights to Owner as set forth below.

(a) Notice of Breach and Assumption If Owner determines that the Airport has failed to cause the timely construction of the District Improvements (the “**Incomplete District Improvements**”) pursuant to the terms of the Owner Development Agreement, and if the Airport fails to cure as required by the Owner Development Agreement, and as a result of such failure the Owner thereafter elects to deliver to the Airport a Notice of Breach pursuant to Section 6.1 of the Owner Development Agreement, Owner shall concurrently provide to the District a copy of the Notice of Breach. Provided Owner concurrently delivers a Notice of Breach to the District as required herein, the District shall have the same amount of time as the Airport under the Owner Development Agreement to cause the cure of the breach set forth in the Notice of Breach. If the breach is not timely cured in accordance with the Owner Development Agreement and Owner elects to deliver an Assumption Notice pursuant to the terms of Section 6.1 of the Owner Development Agreement, Owner shall concurrently provide to the District a copy of the Assumption Notice.

(b) Owner Step-In Rights. If Owner properly exercises its self-help rights pursuant to Section 4(a) of this Agreement and the terms of the Owner Development Agreement, Owner shall promptly commence thereafter its step-in rights in accordance with Section 6.2 of the Owner Development Agreement (the “**Owner Step-In Rights**”) no later than thirty (30) days following Owner’s delivery of the Assumption Notice to the Airport and the District (the “**Owner Exercise Period**”), and, in furtherance thereof, Owner will be assigned that portion of the construction contract covering the Incomplete District Improvements to manage the completion of the Incomplete District Improvements (the “**Step-In Right Work**”), including the coordination of the construction contract related to such work. During the Owner Exercise Period, Owner shall cause the completion of the Step-In Right Work, and the District, in coordination with the District Developer, shall reasonably cooperate to make additional revisions to the construction contract necessary to permit the completion of the Incomplete District Improvements by Owner in accordance with the Final Budget, Construction Schedule and Approved Plans (the “**Construction Contract**”). Notwithstanding the foregoing, as a condition to Owner’s assumption and assignment of the Construction Contract, (a) the District Developer shall be released from any and all liability under the Construction Contract first arising from and after the date of assumption by Owner; and (b) Owner shall be released from any and all liability under the Construction Contract first arising before and prior to the date of assumption by Owner. Following the assumption thereof, Owner will manage the completion of the respective portion of the Construction Contract in accordance with the Final Budget, Construction Schedule and Approved Plans. The Parties recognize that certain step-in rights may further be granted and/or assigned to the Owner’s lender for the Property in conjunction with the Owner Development Agreement and, as such, during any Owner Exercise Period, the Parties agree to reasonably cooperate to negotiate and enter into such documents as may be necessary under the Owner Development Agreement and relative to the Owner’s lender for the Property so that such lender will have substantially the same rights as are granted to Owner in this Agreement.

(c) Assumption Notice. Any Assumption Notice will include (i) the description of the Incomplete District Improvements, (ii) the related Milestone Dates (as defined in the Owner

Development Agreement) under the Construction Schedule that were missed, (iii) the date and time of the assumption of the Construction Contract related responsibilities by Owner, which date must be within the Owner Exercise Period, and (iv) copies of the Certification of Liability Insurance Coverage required in Section 7.

5. Owner Assumption Responsibilities. Upon Owner's assumption of the Construction Contract, or any portion thereof, Owner shall diligently pursue Completion of the Incomplete District Improvements in accordance with the Final Budget, Construction Schedule and Approved Plans, and Owner will be required to report to the District Board on a monthly basis, or more frequently if required by the District, as to the status of completion of the respective portion of the Incomplete District Improvements for which Owner has elected to exercise the Owner Step-In Rights. Provided Owner follows the procedures in this Section 5, upon receipt of the certification required by Section 6 hereof, the District will reimburse Owner from the District Project Funds for Owner's Certified Construction Costs (as defined below). Owner will not be reimbursed under this Agreement for any costs and expenses not otherwise contemplated by the Final Budget. Owner will work with the District Accountant and the District Engineer to ensure that all documentation required to process the release of the District Project Funds, on a monthly basis, is completed in full and properly delivered to assure timely payment is made to the construction contractor under the Construction Contract, and so long as such documentation is provided on a timely basis (and such other requirements under this Section 5 and Section 6 are satisfied) the District will make timely payment to the Owner. The District shall make District Project Funds available for payment of the costs incurred under the Construction Contract and disburse from the District Project Funds the appropriate amounts only upon receipt, review and approval by the District's Accountant and Engineer of the following:

(a) Lien waivers from each contractor verifying that all amounts due to contractors, subcontractors, material providers or suppliers have been paid in full, or an indemnification from Owner holding the District harmless from any claims for unpaid labor or materials related to the Incomplete District Improvements, each in a form reasonably acceptable to the District.

(b) Copies of all contracts, pay requests, change orders, invoices and evidence of payment of same, the final AIA payment form (or similar form approved by the District), canceled checks, and any other requested documentation to verify the amount of reimbursable costs associated with construction of the Incomplete District Improvements requested; and

(c) Such other documentation, records and verifications as may reasonably be required by the District.

6. Certification of Construction Costs. The Parties hereby agree that a condition precedent to the District's release of District Project Funds for costs incurred under the Construction Contract shall be the District's receipt of a written certification of an independent engineer engaged by the District that the construction costs of the Incomplete District Improvements are reasonable and comparable to the costs of similar public improvements constructed in the Denver and Colorado Springs Metropolitan Areas. Such independent engineer's determination shall be conclusive regarding the amount of District Project Funds the District shall be obligated to release for payment under this Agreement ("**Certified Construction Costs**"),

notwithstanding the fact that the actual construction costs incurred may exceed the Certified Construction Costs.

7. Insurance. Prior to, and as a condition to, the assumption of the Construction Contract by the Owner, Owner will provide the District with Certificates of Insurance evidencing that it has the following insurance coverages.

(a) Liability Insurance Coverage.

(i) Workers' Compensation Insurance. A Workers' Compensation Insurance Policy in form and substance reasonably acceptable to the District and in an amount not less than the statutory benefits, including Employer's Liability Insurance with limits of liability of not less than (i) \$500,000 for bodily injury by accident, each accident; (ii) \$500,000 for bodily injury by disease, each employee; and (iii) \$500,000 aggregate liability for disease. The Workers' Compensation Insurance Policy, or an endorsement to such policy, must include a waiver of subrogation in favor of the District.

(ii) Commercial General Liability Insurance. A Commercial General Liability Insurance Policy written on an occurrence basis, in form and substance reasonably acceptable to the District, which policy shall include, without limitation, the District as an additional insured, a waiver of subrogation endorsement in favor of the District, cross liability and severability of interest endorsements, endorsements providing that the coverage afforded by the insurance policy or policies is primary and non-contributing with any other insurance maintained by or available to the District, and appropriate language providing the following coverages: Premises and Operations Liability; Personal Injury Liability; Broad Form Property Damage Liability; Contractual Liability supporting the Consultant's indemnification agreements in favor of the District; Completed Operations and Products Liability; and Independent Contractor's Protective Liability. The Commercial General Liability Insurance Policy must be written with a combined single limit of liability of not less than \$1,000,000 for each occurrence of bodily injury and/or property damage and an annual aggregate of liability of not less than \$2,000,000 for bodily injury and/or property damage, and an annual aggregate of liability of not less than \$2,000,000 for Completed Operations and Products Liability.

(b) Automobile Liability Insurance. An Automobile Liability Insurance Policy written on a per accident basis, in form and substance reasonably acceptable to the District. The Automobile Liability Insurance Policy must provide coverage for all owned, hired, rented and non-owned automobiles, and must include uninsured motorist coverages. The Automobile Liability Insurance Policy must be written with a combined single limit of liability of not less than \$1,000,000 for each accident for bodily injury and/or property damage.

8. Term; Repose. This Agreement shall automatically terminate upon the later of (i) the Completion Date, as defined below, or (ii) once all of the Certified Construction Costs related to the District Improvements under the Owner Development Agreement have been disbursed in accordance with the terms and conditions of this Agreement. The District Improvements shall be deemed Completed pursuant to the terms of Section 5.2 of the Owner

Development Agreement (the “**Completion Date**”). The Parties may terminate this Agreement prior to the Completion Date upon mutual agreement.

9. Notices. All notices, demands, requests or other communications to be sent by one Party to the other hereunder or required by law shall be in writing and shall be deemed to have been validly given or served by delivery of same in person to the addressee or by courier delivery via FedEx or other nationally recognized overnight air courier service, by electronically-confirmed email transmission, or by depositing same in the United States mail, postage prepaid, addressed as follows:

To District: Peak Metropolitan District No. 3
450 East 17th Avenue, Suite 400
Denver, Colorado 80203
Attention: Megan Becher
Email: legalnotices@specialdistrictlaw.com

To Airport: City of Colorado Springs
30 South Nevada Avenue, Suite 604
Colorado Springs, Colorado 80901
Attn: Troy Stover, Business Park Development Director
E-mail: Troy.Stover@coloradodprings.gov

With a copy to: Office of the City Attorney
30 South Nevada Avenue, Suite 501
Colorado Springs, Colorado 80901
Attn: David Andrews
E-mail: David.Andrews@coloradosprings.gov

To Owner: Peak Innovation Property Group, LLC
6106 Carnegie Boulevard, Suite 180
Charlotte, North Carolina 28209
Attn: Jason Bria, Esq.
Email: jbria@PeakInnovationpg.com

Peak Innovation Property Group
1125 17th Street, Suite 800
Denver, Colorado 80202
Attn: Mike Orr
Email: morr@PeakInnovationpg.com

With a copy to: Otten Johnson Robinson Neff & Ragonetti PC
950 17th Street, Suite 1600
Denver, Colorado 80202
Attn: Jed Sonnenshein
Email: jsonnenshein@ottenjohnson.com

All notices, demands, requests or other communications shall be effective upon such personal delivery, one (1) business day after being deposited with FedEx or other nationally recognized overnight air courier service, on the date of transmission if sent by electronically-confirmed email transmission, or three (3) business days after deposit in the United States mail. By giving the other Party hereto at least ten (10) days' written notice thereof in accordance with the provisions hereof, each of the Parties shall have the right from time to time to change its address or contact information.

10. Assignment; Binding Effect. No Party may assign any of its rights or obligations under this Agreement without the prior written consent of the other Parties, which consent may be withheld in any Party's sole and absolute discretion, except as may otherwise be provided herein. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and permitted assigns.

11. Parties Interested Herein. Nothing expressed or implied in this Agreement is intended or shall be construed to confer upon, or to give to, any person other than the District, Owner and the Airport any right, remedy, or claim under or by reason of this Agreement or any covenants, terms, conditions, or provisions thereof, and all the covenants, terms, conditions, and provisions in this Agreement by and on behalf of the District, Owner and Developer shall be for the sole and exclusive benefit of the District, Owner, and the Airport.

12. Default/Remedies. In the event of a breach or default of this Agreement by any Party, the non-defaulting Party shall be entitled to exercise all remedies available at law or in equity. In the event of any litigation, arbitration or other proceeding to enforce the terms, covenants or conditions hereof, the prevailing Party in such proceeding shall obtain as part of its judgment or award its reasonable attorneys' fees.

13. Governing Law and Jurisdiction. This Agreement shall be governed and construed under the laws of the State of Colorado. Venue for any legal action relating to this Agreement shall be exclusive to the State District Court in and for the City and County of Broomfield, Colorado.

14. Inurement. Each of the terms, covenants and conditions hereof shall be binding upon and inure to the benefit of the Parties hereto and their respective permitted successors and assigns.

15. Integration. This Agreement constitutes the entire agreement between the Parties with respect to the matters addressed herein. All prior discussions and negotiations regarding the subject matter hereof are merged herein.

16. Severability. If any covenant, term, condition, or provision under this Agreement shall, for any reason, be held to be invalid or unenforceable, the invalidity or unenforceability of such covenant, term, condition, or provision shall not affect any other provision contained herein, the intention being that such provisions are severable.

17. Counterparts. This Agreement may be executed in one or more counterparts, each of which shall constitute an original and all of which shall constitute one and the same document.

18. Paragraph Headings. Paragraph headings are inserted for convenience of reference only.

19. Amendment. This Agreement may be amended from time to time by agreement between the Parties hereto; provided, however, that no amendment, modification, or alteration of the terms or provisions hereof shall be binding upon the District, Owner or the Airport unless the same is in writing and duly executed by the Parties hereto.

SIGNATURE PAGES FOLLOW

IN WITNESS WHEREOF, the Parties have executed this Agreement as of the day and year first set forth above.

DISTRICT:

PEAK METROPOLITAN DISTRICT NO. 3, a quasi-municipal corporation and political subdivision of the State of Colorado

By: _____
Garrett Baum, President

Attest:

Secretary

AIRPORT:

**CITY OF COLORADO SPRINGS,
COLORADO**, a home rule city and Colorado
municipal corporation, by and through its
enterprise, the Colorado Springs Municipal Airport

By:

Blessing A. Mobolade, Mayor

Date:

Attest:

By:

Troy Stover
Business Park Development Director

APPROVED AS TO FORM:

David Andrews, Office of the City Attorney

OWNER:

PEAK INNOVATION, LLC,
a Delaware limited liability company

By: Peak Innovation Investments, LLC,
a Delaware limited liability company
Its: Manager

By: _____
Jason K. Bria
Its: Authorized Signatory

EXHIBIT A
AVAILABILITY OF FUNDS AND STEP-IN RIGHTS AGREEMENT

Owner Property

Lot 6, Colorado Springs Airport Filing No. 1F plat recorded on September 20, 2022, and recorded at Reception Number 222715016 in the Clerk and Recorder's Office of El Paso County, Colorado.

EXHIBIT B
AVAILABILITY OF FUNDS AND STEP-IN RIGHTS AGREEMENT

Offsite Improvements

EXHIBIT C

AVAILABILITY OF FUNDS AND STEP-IN RIGHTS AGREEMENT

Owner Development Agreement