

## **AGREEMENT OF PURCHASE AND SALE**

**THIS AGREEMENT OF PURCHASE AND SALE** (this "Agreement") is dated and effective as of May\_\_\_\_\_, 2019 (the "Effective Date"), and is made by and between THE CITY OF YAKIMA ("Seller"), and HEYDEN PROPERTIES, LLC, a Washington limited liability company and/or assigns ("Buyer").

### **ARTICLE I PURCHASE AND SALE OF PROPERTY**

#### **Section 1.1 Sale.**

Seller agrees to sell to Buyer, and Buyer agrees to purchase from Seller, on the terms and conditions set forth herein, that certain real property located at 2312 W. Nob Hill Boulevard, City of Yakima, County of Yakima, State of Washington, which real property is more particularly described in Exhibit A attached hereto ("Land"), together with: (a) any and all rights, privileges and easements appurtenant thereto; and (b) all of Seller's right, title and interest in and to (i) all permits, building plans and specifications, certificates of occupancy, operating permits, sign permits, development rights and approvals, certificates, licenses, warranties and guarantees, trade names, service marks, engineering, soils, pest control and other reports relating to the Land, (ii) all other intangible property, miscellaneous rights, benefits or privileges of any kind or character with respect to the Land (all items in this clause (b) are hereinafter collectively referred to as the "Intangible Property"). The Land, the Intangible Property and all other property rights and interests described in clause (a) above are hereinafter collectively referred to as the "Property."

#### **Section 1.2 Escrow.**

The transaction contemplated by this Agreement shall be consummated through an escrow with Pacific Alliance Title, LLC ("Title Company"), using the following address and escrow officer:

Pacific Alliance Title, LLC  
311 North Fourth Street, Suite 102  
Yakima, WA 98901  
Attn: Kim Brumback  
[kbrumback@pacificalliancetitle.com](mailto:kbrumback@pacificalliancetitle.com)  
Phone: (509) 225-6809  
Fax: (509) 248-8924

### Section 1.3 Purchase.

#### Price.

(a) The purchase price of the Property is Three Hundred Twenty Five Thousand Dollars (\$325,000) (the "Purchase Price").

(b) The Purchase Price shall be paid as follows:

(1) Within five (5) business days after the Effective Date, Buyer shall deposit into escrow with Title Company the cash amount of Ten Thousand Dollars (\$10,000.00) (the "Deposit"). The Deposit shall be held in an interest bearing account. Upon the expiration of the Contingency Period and Buyer providing the Approval Notice (defined below) to Seller, the Deposit shall become non-refundable except as set forth in this Agreement.

(2) (A) IF THE SALE OF THE PROPERTY AS CONTEMPLATED HEREUNDER IS CONSUMMATED, THEN THE DEPOSIT SHALL BE PAID TO SELLER AT THE CLOSING AND CREDITED AGAINST THE PURCHASE PRICE.

(B) IF THE SALE IS NOT CONSUMMATED DUE SOLELY TO A DEFAULT BY BUYER HEREUNDER, THEN SELLER, AS ITS SOLE REMEDY, SHALL RETAIN THE DEPOSIT AS LIQUIDATED DAMAGES. THE PARTIES HAVE AGREED THAT SELLER'S ACTUAL DAMAGES, IN THE EVENT OF A FAILURE TO CONSUMMATE THIS SALE DUE SOLELY TO BUYER'S DEFAULT, WOULD BE EXTREMELY DIFFICULT OR IMPRACTICABLE TO DETERMINE. AFTER NEGOTIATION, THE PARTIES HAVE AGREED THAT, CONSIDERING ALL THE CIRCUMSTANCES EXISTING ON THE EFFECTIVE DATE, THE AMOUNT OF THE DEPOSIT IS A REASONABLE ESTIMATE OF THE DAMAGES THAT SELLER WOULD INCUR IN SUCH EVENT. BY PLACING THEIR INITIALS BELOW, EACH PARTY SPECIFICALLY CONFIRMS THE ACCURACY OF THE STATEMENTS MADE ABOVE AND THE FACT THAT EACH PARTY WAS REPRESENTED BY COUNSEL WHO EXPLAINED, AT THE TIME THIS AGREEMENT WAS MADE, THE CONSEQUENCES OF THIS LIQUIDATED DAMAGES PROVISION. THE FOREGOING IS NOT INTENDED TO LIMIT BUYER'S OBLIGATIONS UNDER SECTION 6.1 AND SECTION 9.3.

INITIALS: SELLER \_\_\_\_\_ BUYER W/H

(C) IF THE SALE OF THE PROPERTY IS NOT CONSUMMATED DUE TO A DEFAULT OF SELLER, THEN BUYER MAY EITHER: (1) TERMINATE THIS AGREEMENT AND RECEIVE A REFUND OF THE DEPOSIT AND RECOVER FROM SELLER ANY DAMAGES INCURRED BY BUYER AS A RESULT OF SUCH DEFAULT, IN WHICH EVENT BUYER SHALL HAVE NO FURTHER RIGHTS OR OBLIGATIONS HEREUNDER EXCEPT AS PROVIDED IN SECTION 6.1 AND SECTION 9.3 BELOW, OR (2) BUYER MAY ENFORCE SPECIFIC

PERFORMANCE OF THIS AGREEMENT. THE FOREGOING IS NOT INTENDED TO LIMIT SELLER'S OBLIGATIONS UNDER SECTION 6.1.

- (3) The balance of the Purchase Price shall be paid to Seller all in cash at the Closing, with no financing contingency.

## **ARTICLE II CONDITIONS**

### **Section 2.1 Buyer's Conditions Precedent.**

Buyer's obligation to purchase the Property is conditioned upon the following:

- (a) Buyer's review and approval of the Title Documents (as defined in Section 4.2). As soon as possible, but no later than seven (7) days after the Effective Date, Seller shall deliver to Buyer: (i) a copy of the Title Documents, including any survey of the Property in Seller's possession; and (ii) a copy of Seller's existing ALTA survey (the "Survey").
- (b) Buyer's review and approval of the documents and information listed on Exhibit B, attached hereto, together with all other documents and materials relating to the Property (the "Due Diligence Materials"), all of which Seller shall deliver to Buyer no later than seven (7) days after the Effective Date.
- (c) Buyer's review and approval of all zoning, land use, building, environmental and other statutes, rules or regulations applicable to the Property.
- (d) Buyer's review and approval of the physical, legal, economic and environmental condition of the Property and any other matters Buyer deems relevant to the Property.
- (e) (i) The irrevocable commitment of Title Company to issue the Title Policy (as hereinafter defined) to Buyer at Closing; and (ii) the issuance of the Title Policy at Closing.
- (f) All of the representations and warranties made by Seller to Buyer pursuant to this Agreement shall be true and correct in all material respects as of the Closing Date, as if made on such date.
- (g) No adverse change in the physical condition of the Property, or in the permitted use or zoning of the Property, shall have occurred after the end of the Contingency Period.
- (h) Seller shall have delivered each of the documents described in Section 8.3(a), prior to the Closing Date.
- (i) Effective as of the Closing Date, Seller shall have terminated Contract(s), if any, that Buyer has not elected to assume pursuant to Section 7.4.

The conditions precedent set forth in this Section 2.1 are solely for the benefit of Buyer and may be waived only by Buyer. Buyer's determination as to whether such conditions have been satisfied shall be made by Buyer in Buyer's sole, absolute and unfettered discretion. Buyer shall, at all times prior

to the termination of this Agreement, have the right to waive any of these conditions. No such waiver shall affect Buyer's ability to pursue any remedy it may have with respect to any breach hereunder by Seller.

## **Section 2.2 Contingency Period.**

As used in this Agreement, the term "Contingency Period" means that period commencing on the Effective Date and ending at 5:00 p.m. Pacific Time on the date that is forty five (45) days after the Effective Date. Buyer shall have until the end of the Contingency Period to review and approve the matters described in Section 2.1(b) through Section 2.1(d) above in Buyer's sole, absolute and unfettered discretion. Buyer shall have the right to terminate this Agreement prior to the expiration of the Contingency Period for any reason or no reason, as determined by Buyer in Buyer's sole, absolute and unfettered discretion, in which case the Deposit shall be returned to Buyer and neither party shall have any further rights or obligations hereunder except as provided in Section 6.1 and Section 9.3 below. If Buyer terminates this Agreement pursuant to the foregoing sentence, then Seller shall retain out of the Deposit, as independent consideration for Buyer's right to terminate this Agreement, the sum of one hundred dollars (\$100.00) together with the amount of the direct cost to terminate escrow. If Buyer determines to proceed with the purchase of the Property, then Buyer shall, before the end of the Contingency Period, notify Seller in writing (the "Approval Notice") that Buyer has approved all of the matters described in Section 2.1(b) through Section 2.1(d) above, including, without limitation, the Due Diligence Materials. If, before the end of the Contingency Period, Buyer fails to give Seller an Approval Notice, then Buyer shall be deemed to have elected to terminate this Agreement, the Deposit shall be returned to Buyer subject to the conditions stated herein and neither party shall have any further rights or obligations hereunder except as provided in Section 6.1 and Section 9.3 below. If any other condition precedent set forth above is not satisfied as of the time specified for satisfaction, then Buyer may, by written notice given to Seller before the Closing or such other date specified for the satisfaction of such condition, elect to terminate this Agreement or waive such condition. If Buyer elects to terminate this Agreement (or is deemed to have elected to terminate this Agreement pursuant to a provision that states that Buyer's failure to approve a condition shall be deemed Buyer's disapproval of such condition), then Buyer shall receive a refund of the Deposit, subject to the conditions of this Section 2.2, and neither party shall have any further rights or obligations hereunder except as provided in Section 6.1 and Section 9.3 below.

## **ARTICLE III REPRESENTATIONS AND WARRANTIES**

### **Section 3.1 Seller's Representations and Warranties.**

Seller hereby makes the following representations and warranties to Buyer:

- (a) Seller has not (i) made a general assignment for the benefit of creditors, (ii) filed any voluntary petition in bankruptcy or suffered the filing of any involuntary petition by Seller's creditors, (iii) suffered the appointment of a receiver to take possession of all, or substantially all, of Seller's assets, (iv) suffered the attachment or other judicial seizure of all, or substantially all, of Seller's assets, (v) admitted in writing its inability to pay its debts as they come due, or (vi) made an offer of settlement, extension or composition to its creditors generally.

- (b) Seller is not a "foreign person" as defined in Section 1445 of the Internal Revenue Code of 1986, as amended (the "Code") and any related regulations.
- (c) This Agreement has been duly authorized, executed and delivered by Seller, and neither the execution and delivery of this Agreement and the documents and instruments referenced herein, nor the performance of the obligations set forth herein, nor the consummation of the transaction contemplated herein, nor compliance with the terms of this Agreement and the documents and instruments referenced herein conflict with or result in the breach of any terms, conditions or provisions of, or constitute a default under, any bond, note, or other evidence of indebtedness or any contract, indenture, mortgage, deed of trust, loan, partnership agreement, lease or other agreement or instrument to which Seller is a party or affecting the Property.
- (d) Seller has the power and authority to enter into this Agreement and to perform its obligations hereunder.
- (e) There is no pending or, to the best of Seller's knowledge, threatened proceedings in eminent domain that would affect the Property or any portion thereof.
- (f) Seller and Property are subject to the terms and provisions of the "Amended Consent Decree Between Ecology and Yakima," executed by the parties and the court and filed on September 5, 2014 in the Superior Court of the State of Washington in and for Thurston County under case number 02-2-00956-2 (hereafter "Amended Consent Decree"), and the terms and conditions of an Environmental Covenant recorded against the Property. There is no other litigation, action, suit, arbitration, claims proceeding or governmental investigation in law or equity pending or, to the best of Seller's knowledge, threatened, with respect to the Property or against Seller that would prevent Seller from performing its obligations hereunder.
- (g) Except as stated below, Seller has received no written notice from any governmental authority and Seller has no knowledge that the present use and operation of the Property is in violation of any applicable law, including, without limitation, (i) building codes, zoning ordinances and any other laws relating to the use, ownership, construction or design of the improvements on the Property, including, without limitation, fire, safety, handicapped access, and/or seismic design. Seller and Property are subject to the terms and provisions of an "Amended Consent Decree Between Ecology and Yakima," executed by the parties and the court and filed on September 5, 2014 in the Superior Court of the State of Washington in and for Thurston County under case number 02-2-00956-2 (hereafter "Amended Consent Decree"), and the terms and conditions of an Environmental Covenant recorded against the Property.
- (h) Seller has not been advised in writing of and is not otherwise aware of any plan, study or effort by any governmental agency or authority that would materially adversely affect the present use or zoning of any portion of the Property or that would modify or realign any adjacent street or highway.
- (i) To the best of Seller's knowledge, other than the amounts disclosed by the tax bills delivered or to be delivered by Seller to Buyer as part of the Due Diligence Materials, or supplemental taxes imposed as a result of the transfer of the Property to Buyer, no other taxes have been

or will be assessed on the Property, or any portion thereof, with respect to the year in which the Closing Date occurs or any prior year, and no special assessments of any kind (special, bond or otherwise) are or have been levied against the Property, or any portion thereof.

- (j) To the best of Seller's knowledge, except as otherwise disclosed in the Amended Consent Decree, there are no underground or other storage tanks on the Property and there are no Hazardous Materials (as defined below) in existence on, under or about the Property in violation of any Environmental Laws (as defined below). For purposes of this Agreement, "Hazardous Materials" means inflammable materials, petroleum products, explosives, radioactive materials, asbestos, mold, polychlorinated biphenyls, lead, lead-based paint and any other substance or material that is listed in or regulated under any applicable federal, state or local laws pertaining to the protection of health or the environment, including, without limitation, the Federal Water Pollution Act, as amended (33 U.S.C. § 1251 et seq.), the Resource Conservation and Recovery Act, as amended (42 U.S.C. § 6901 et seq.), the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended (42 U.S.C. § 9601 et seq.), the Hazardous Materials Transportation Act, as amended (49 U.S.C. § 1801 et seq.), and the Model Toxics Control Act, as amended (Chapter 70.105D RCW). (collectively, "Environmental Laws").
- (k) To the best of Seller's knowledge, all items delivered or to be delivered by Seller pursuant to this Agreement, including without limitation the Due Diligence Materials, are and will be true, correct and complete in all material respects and do fairly present the information set forth in a manner that is not misleading.
- (l) Attached to this Agreement as Exhibit C is a true, correct and complete schedule of the Amended Consent Decree and all of the contracts and agreements affecting the Property, if any (the "Contracts").

Each of the representations and warranties of Seller contained in this Section 3.1: (1) is true as of the Effective Date; (2) shall be deemed made by Seller, and shall be true in all material respects as of the date of Closing, and (3) shall survive the Closing as provided in Section 3.2 below.

### **Section 3.2 Survival of Representations and Warranties.**

The representations and warranties of Seller and Buyer contained herein, and the parties' indemnification obligations contained in Section 3.6, shall survive for a period of twelve (12) months after the Closing (the "Survival Period"). Any claim that Buyer or Seller may have at any time against the other for indemnification or a breach of any such representation or warranty, whether known or unknown, that is not asserted by written notice to the other within one (1) month following the expiration of the Survival Period, and as to which a legal action has not been filed within four (4) months following the Survival Period, shall be deemed waived, unless otherwise agreed in writing by the parties.

### **Section 3.3 Seller's Knowledge.**

For purposes of this Agreement and any document(s) delivered at Closing, whenever the phrase "to the best of Seller's knowledge" or the "knowledge" of Seller or words of similar import are used, they shall be deemed to refer to the actual knowledge of Seller's representatives and not any implied,

imputed or constructive knowledge; provided the foregoing parties shall be charged with knowledge of information contained in Seller's files, and shall also make reasonable inquiries of the property manager and any other individuals with material knowledge and/or involvement with the Property. Seller represents and warrants to Buyer that the foregoing parties are the Seller's representatives with primary responsibility for the oversight and maintenance of the Property.

### **Section 3.4 Representations and Warranties of Buyer.**

Buyer hereby makes the following representations and warranties to Seller:

- (a) Buyer has not (i) made a general assignment for the benefit of creditors, (ii) filed any voluntary petition in bankruptcy or suffered the filing of any involuntary petition by Buyer's creditors, (iii) suffered the appointment of a receiver to take possession of all, or substantially all, of Buyer's assets, (iv) suffered the attachment or other judicial seizure of all, or substantially all, of Buyer's assets, (v) admitted in writing its inability to pay its debts as they come due, or (vi) made an offer of settlement, extension or composition to its creditors generally.
- (b) This Agreement has been duly authorized, executed and delivered by Buyer, and neither the execution and delivery of this Agreement and the documents and instruments referenced herein, nor the performance of the obligations set forth herein, nor the consummation of the transaction contemplated herein, nor compliance with the terms of this Agreement and the documents and instruments referenced herein conflict with or result in the breach of any terms, conditions or provisions of, or constitute a default under, any bond, note, or other evidence of indebtedness or any contract, indenture, mortgage, deed of trust, loan, partnership agreement, lease or other agreement or instrument to which Buyer is a party.
- (c) Buyer is duly formed, validly existing and in good standing under the laws of the State of Washington and has the power and authority to enter into this Agreement and to perform its obligation hereunder.

Each of the representations and warranties of Buyer contained in this Section shall be deemed made by Buyer as of the Closing and shall survive the Closing, to the extent provided in Section 3.2 above.

- (d) Buyer acknowledges and agrees that it has been given or will be given before the end of the Contingency Period, a full opportunity to inspect and investigate each and every aspect of the Property, either independently or through agents of Buyer's choosing.

### **Section 3.5 "As Is" Purchase.**

Buyer agrees to accept the Property "AS IS, WHERE IS, WITH ALL FAULTS," including but not limited to the environmental condition of the Property. Buyer further acknowledges that: (a) Buyer has been provided with a copy of the Amended Consent Decree on file in Thurston County Superior Court, cause No. 02-2-00956-2 pertaining to the property located at 2312 W. Nob Hill Blvd., Yakima, WA; (b) no representations or warranties, whether express or implied, have been made to Buyer by Seller as to the condition of the Property or its suitability for particular purposes or uses and Buyer is not relying on any such warranty or representation as a condition or inducement to purchase the

Property. In particular, and without limitation, Seller does not expressly or impliedly warrant that the Property meets any current City, County, State or Federal building codes, ordinances, laws or regulations relative to occupancy, electrical, plumbing, heating, mold, sewage, septic, water, roof, structure, use or any other nature or comply with any applicable environmental laws. Buyer assumes the complete responsibility to check with the appropriate governmental authority for its intended use of the Property. Seller shall not be responsible for the repair, replacement or modification of any deficiencies, malfunctions, or mechanical defects in the materials, workmanship, utilities and mechanical components of the Property prior to and/or subsequent to Closing.

### **Section 3.6 Release.**

- (a) Except as set forth in subsection (b) below, upon Closing, Buyer shall be deemed to have waived, relinquished and released Seller and Seller's elected and appointed officials, officers, directors, shareholders, employees and agents (collectively, "Seller Parties") from and against any and all claims, demands, causes of action (including causes of action in tort and causes of action related to environmental conditions), losses, damages, liabilities, costs and expenses (including attorneys' fees and court costs) of any and every kind or character, known or unknown, which Buyer might have asserted or alleged against Seller Parties at any time by reason or arising out of any latent or patent construction defects or physical conditions, environmental conditions, natural resource damages, violations of any applicable laws (including, without limitation, any environmental laws) and any and all other acts, omissions, events, circumstances or matters regarding the Property and conduct thereon. The terms and conditions of this Section shall expressly survive the Closing and shall not merge with the provisions of any closing documents.
- (b) Pursuant to the terms of the Amended Consent Decree, Seller has entered into a remediation action plan with the Washington State Department of Ecology ("Department of Ecology") for the cleanup of described hazardous wastes within the Property. Upon closing, it shall become Buyer's sole responsibility to continue to comply with the remediation plan for the Property in cooperation with the Department of Ecology and in accordance with the terms of the Amended Consent Decree. Buyer will cooperate with the Department of Ecology to enable the continuation of such remediation efforts, and will further comply with the Environmental Covenant recorded against the Property. While Seller understands and believes that the remaining remediation will consist primarily of continuing to monitor groundwater quality (by means of established monitoring well sampling), Seller cannot represent, promise or warrant that required remediation after closing of this purchase and sale transaction will be limited to such well sampling. In the event required remediation consists of anything beyond or in addition to monitoring groundwater quality (by means of established monitoring well sampling), Buyer agrees to assume such additional remediation work and hereby releases Seller Parties from the performance of such additional remediation efforts, and further releases Seller Parties from and against any and all claims, demands, causes of action (including causes of action in tort and causes of action related to environmental conditions), losses, damages, liabilities, costs and expenses (including attorneys' fees and court costs) of any and every kind or character, known or unknown, which Buyer might have asserted or alleged against Seller Parties at any time by reason or arising out of any damage or loss to the Property and Buyer's improvements within or upon such Property. The terms and conditions of this Section shall expressly survive the Closing and shall not merge with the provisions of any closing documents.



### **Section 3.7 Indemnification.**

Buyer hereby agrees to indemnify, defend and hold harmless Seller Parties for, from and against any and all claims, obligations, liabilities, demands, losses, damages, liens, causes of actions, suits, costs and expenses (including attorneys' fees and court costs) relating to or in any way arising from the Property and any conduct thereon; and including any environmental condition thereon or thereunder within the terms of Section 3.6 above. The terms and conditions of this Section shall expressly survive the Closing and shall not merge with the provisions of any closing documents.

## **ARTICLE IV TITLE**

### **Section 4.1 Conditions of Title.**

At the Closing, Seller shall convey title to the Property to Buyer by statutory warranty deed (the "Deed") subject to no exceptions other than:

- (a) Non-delinquent liens for real estate taxes and assessments; and
- (b) Any exceptions disclosed by Title Documents and approved by Buyer in writing pursuant to Section 4.2.

All of the foregoing exceptions shall be referred to collectively as the "Approved Conditions of Title." Notwithstanding anything to the contrary contained in this Agreement, Buyer hereby disapproves all liens evidencing secured monetary encumbrances (other than liens for non-delinquent real estate property taxes and assessments) and Seller agrees to cause all such liens to be eliminated at Seller's sole cost and expense (including all prepayment penalties and charges, if any) prior to or concurrently with the Closing.

### **Section 4.2 Title Review.**

Buyer shall have the right to approve any and all matters of and exceptions to title of the Property, as disclosed by the following documents and instruments (collectively, "Title Documents"): (i) a preliminary title report ("Preliminary Report") issued by Title Company with respect to the Property and all matters referenced therein; (ii) legible copies of all documents, whether recorded or unrecorded, referred to in such Preliminary Report; and (iii) an updated survey of the Property. Buyer shall, not later than ten (10) business days following Buyer's receipt of the Title Documents ("Title Review Period"), give Seller written notice ("Buyer's Title Notice") of Buyer's approval or disapproval, which shall be made in Buyer's sole and absolute discretion, of the legal description and every item or exception disclosed by the Title Documents. The failure of Buyer to give Buyer's Title Notice to Seller prior to the expiration of the Title Review Period shall be deemed Buyer's disapproval of title to the Property. If Buyer disapproves of any matter of title shown in the Title Documents, Seller shall, within five (5) days after Buyer's Title Notice is received by Seller, give Buyer written notice (the "Seller's Response") of those disapproved title matters, if any, that Seller is unable or unwilling to have eliminated from title to the Property as of the Closing. Seller's failure to timely give a Seller's Response shall be deemed Seller's agreement not to remove or to cause to be removed any disapproved title matters identified in Buyer's Title Notice. If Seller notifies Buyer within the time

provided above that Seller is unable or unwilling to remove any of the title matters objected to by Buyer in Buyer's Title Notice, Buyer shall have until the date that is three (3) days after receipt of Seller's Response to notify Seller in writing that either (1) Buyer is willing to purchase the Property subject to such disapproved exceptions, or (2) Buyer elects to cancel this transaction. Failure of Buyer to take either one of the actions described in clauses (1) or (2) above shall be deemed to be Buyer's election to take the action described in clause (2) above, in which case the Deposit shall be returned to Buyer and neither party shall have any further rights or obligations hereunder, except as provided in Section 6.1 and Section 9.3 hereof. If Seller agrees to remove any disapproved title matters, then Seller shall remove them prior to the Closing. Seller covenants that, after the Title Review Period, Seller shall not cause title to the Property to differ from the Approved Conditions of Title. Any liens, encumbrances, encroachments, easements, restrictions, conditions, covenants, rights, rights-of-way or other matters affecting the Approved Conditions of Title that may appear of record or be revealed after the Title Review Period, shall also be subject to Buyer's approval as a condition to the Closing for Buyer's benefit.

#### **Section 4.3 Evidence of Title.**

Delivery of title in accordance with the foregoing shall be evidenced by the irrevocable commitment of Title Company to issue, at Closing, its Owner's 2006 ALTA Standard Coverage Policy of Title Insurance in the amount of the Purchase Price showing title to the Real Property vested in Buyer, and insuring all appurtenant easements, subject only to the Approved Conditions of Title and with such endorsements as may be requested by Buyer (the "Title Policy").

### **ARTICLE V RISK OF LOSS AND INSURANCE PROCEEDS**

#### **Section 5.1 Minor Loss.**

Buyer shall be bound to purchase the Property for the full Purchase Price as required by the terms hereof, without regard to the occurrence or effect of any damage to the Property or condemnation of any portion of the Property, provided that: (a) the cost to repair any such damage or the diminution in the value of the remaining Property as a result of a partial condemnation, does not exceed Ten Thousand Dollars (\$10,000.00) and (b) upon the Closing, there shall be a credit against the cash portion of the Purchase Price due hereunder in an amount equal to the amount of any insurance proceeds or condemnation awards collected by Seller as a result of any such damage or condemnation, plus the amount of any insurance deductible, less any sums expended by Seller toward the restoration of the Property, plus any additional funds needed to fully restore the Property. If the proceeds or awards have not been collected as of the Closing, then such proceeds or awards shall be assigned to Buyer, except to the extent needed to reimburse Seller for any sums expended by Seller toward the restoration of the Property. Buyer shall have the right to participate in any adjustment of the insurance claim.

#### **Section 5.2 Major Loss.**

If the amount of the damage or destruction or condemnation as specified above exceeds Ten Thousand Dollars (\$10,000.00), then Buyer may, at its option to be exercised within ten (10) business days of Seller's notice of the occurrence of the damage or the commencement of condemnation proceedings, either terminate this Agreement or consummate the purchase for the

full Purchase Price as required by the terms hereof. If Buyer elects to terminate this Agreement or fails to give Seller notice within said ten business day period that Buyer will proceed with the purchase, then the Deposit shall be returned to Buyer and neither party shall have any further rights or obligations hereunder except as provided in Section 6.1 and Section 9.3. If Buyer elects to proceed with the purchase, then upon the Closing, there shall be a credit against the Purchase Price due hereunder in an amount equal to the amount of any insurance proceeds or condemnation awards collected by Seller as a result of any such damage or condemnation (or, if uninsured, a credit in the amount of the cost of repair), plus the amount of any insurance deductible, less any sums expended by Seller toward the restoration of the Property, plus any additional funds needed to fully restore the Property. If the proceeds or awards have not been collected as of the Closing, then such proceeds or awards shall be assigned to Buyer, except to the extent needed to reimburse Seller for any sums expended by Seller toward the restoration of the Property. Buyer shall have the right to participate in any adjustment of the insurance claim.

### **Section 5.3 Uninsured Casualty.**

Without limiting Buyer's right to terminate this Agreement as provided in Section 5.2, if a casualty is uninsured, the Purchase Price shall be reduced by the full amount of the cost to perform the restoration of the Property, less any sums expended by Seller toward the restoration of the Property; provided, however, that if the amount of any uninsured damage of the Property is in excess of Ten Thousand Dollars (\$10,000.00), then Seller may, at its option to be exercised within ten (10) business days after the occurrence of the damage, elect to terminate this Agreement by giving written notice of such election to Buyer within that ten-day period, in which case the Deposit shall be returned to Buyer and neither party shall have any further rights or obligations hereunder except as provided in Section 6.1 and Section 9.3.

## **ARTICLE VI BROKERS AND EXPENSES**

### **Section 6.1 Brokers.**

The parties represent and warrant to each other that no broker or finder was instrumental in arranging or bringing about this transaction except for Nick Ritch and Mike Abrams of Heritage Moultray Real Estate Services, LLC ("Broker"). Only upon Closing, Seller shall pay Broker six percent (6.00%) of the sales price as full commission for their representation in the sale. If any other person brings a claim for a commission or finder's fee based upon any contact, dealings or communication with Buyer or Seller, then the party through whom such person makes his claim shall defend the other party (the "Indemnified Party") from such claim, and shall indemnify the Indemnified Party and hold the Indemnified Party harmless from any and all costs, damages, claims, liabilities or expenses (including without limitation, reasonable attorneys' fees and disbursements) incurred by the Indemnified Party in defending against the claim. The provisions of this Section 6.1 shall survive the Closing or, if the purchase and sale is not consummated, any termination of this Agreement.

## **ARTICLE VII SELLER'S COVENANTS**

### **Section 7.1 New Agreements Affecting the Property.**

Between the Effective Date and the Closing, Seller shall not enter into any contract or other agreement affecting the Property, or modify, amend or terminate any agreement affecting the Property, without first notifying Buyer and without obtaining Buyer's prior written approval, which may be given or withheld in Buyer's sole discretion. In connection with a request for Buyer's approval of such action, Seller shall provide Buyer with information about the proposed form of agreement and such other information as Buyer shall reasonably request. Buyer shall respond to any request for approval within three (3) business days after receipt of a request therefor from Seller.

### **Section 7.2 Maintenance of the Property.**

Between the Effective Date and the Closing, Seller (a) shall maintain the Property in a manner consistent with past practices and in accordance with Seller's normal course of operation, (b) shall maintain reasonable and customary levels and coverages of insurance, (c) shall not create or acquiesce in the creation of liens or exceptions to title other than the Approved Conditions of Title, and (d) shall not take or permit to be taken any action that would render any of the representations or warranties of Seller set forth in this Agreement incorrect or untrue as of the Closing.

### **Section 7.3 Termination of Contracts.**

During the Contingency Period, Buyer shall provide Seller with written notice identifying the Contracts that Buyer elects to assume at Closing, if any. If Buyer fails to provide such written notice to Seller with respect to any Contract, Buyer shall be deemed to have elected not to assume such Contracts. Seller shall terminate any Contract not to be assumed by Buyer pursuant to this Section 7.3 and shall pay any fees or penalties payable with respect to the termination of such property management agreement or Contracts.

## **ARTICLE VIII CLOSING AND ESCROW**

### **Section 8.1 Escrow Instructions.**

Upon execution of this Agreement, the parties hereto shall deposit an executed counterpart of this Agreement with Title Company, and this instrument shall serve as the instructions to Title Company as the escrow holder for consummation of the purchase and sale contemplated hereby, as may be supplemented by separate instructions that are consistent with this Agreement. Seller and Buyer agree to execute such reasonable additional and supplementary escrow instructions as may be appropriate to enable Title Company to comply with the terms of this Agreement; provided, however, that in the event of any conflict between the provisions of this Agreement and any supplementary escrow instructions, the terms of this Agreement shall control.

## **Section 8.2 Closing.**

The Closing hereunder shall be held, and delivery of all items to be made at the Closing under the terms of this Agreement shall be made, at the offices of Title Company on that date (the "Closing Date") that is fifteen (15) days after the last day of the Contingency Period.

## **Section 8.3 Deposit of Documents.**

(a) At or before Closing, Seller shall deposit into escrow the following items:

- (1) the duly executed and notarized Deed in the form attached hereto as Exhibit D, conveying the Property to Buyer;
- (2) two duly executed counterparts of an Assignment of Contracts, Warranties and Intangible Property in the form attached hereto as Exhibit E (the "Assignment");
- (3) an affidavit pursuant to Section 1445(b)(2) of the Federal Code, and on which Buyer is entitled to rely, that Seller is not a "foreign person" within the meaning of Section 1445(f)(3) of the Federal Code; and
- (4) such other authorizations, documents and information as may be reasonably required by Title Company to consummate the transaction contemplated herein, including, without limitation, any affidavits that Title Company may require in order to remove exceptions contained in the ALTA Title Policy, such as those regarding bankruptcy matters.

(b) At or before Closing, Buyer shall deposit into escrow the following items:

- (1) funds necessary to close this transaction; and
  - (2) two (2) duly executed counterparts of the Assignment.
- (c) Seller and Buyer shall each deposit such other instruments as are reasonably required by Title Company or otherwise required to close the escrow and consummate the acquisition of the Property in accordance with the terms hereof. Seller and Buyer hereby designate Title Company as the "Reporting Person" for the transaction pursuant to Section 6045(e) of the Internal Revenue Code and the regulations promulgated thereunder and agree to execute such documentation as is reasonably necessary to effectuate such designation.
- (d) Contracts to be assumed by Buyer pursuant to this Agreement and the Assignment, booklets, manuals, warranties and other documents relating to the Property or any part thereof, copies or originals of all the tenant correspondence files and originals of any other items that Seller was required to furnish Buyer copies of or make available pursuant to Section 2.1 above.

## **Section 8.4 Prorations and Closing Costs.**

- (a) The following shall be prorated as of 12:01 a.m. on the date the Deed is recorded, on the basis of a 365-day year: real property taxes and assessments; all utility charges; amounts payable under any contracts; annual permits and/or inspection fees (calculated on the basis

of the period covered); and any other expenses of the maintenance of the Property. Buyer shall cause all utilities to be transferred to Buyer's name at Closing and shall post all required deposits in connection therewith, and Seller shall be responsible for obtaining refunds of any deposits it may have with utility companies. Buyer and Seller shall cooperate to produce prior to the Closing Date a schedule of prorations to be made on and after the Closing Date as complete and accurate as reasonably possible. All prorations that can be liquidated accurately or reasonably estimated as of the Closing Date shall be made in escrow on the Closing Date. Seller and Buyer hereby agree that if any of the aforesaid prorations and credits cannot be calculated accurately on the Closing Date, or if there are any adjustments to initially estimated prorations, then the same shall be calculated or adjusted as soon as reasonably practicable after the Closing Date and either party owing the other party a sum of money based on such subsequent prorations or credits shall promptly pay said sum to the other party.

- (b) Seller shall pay: (i) all of the excise tax applicable to the sales price of the Property; (ii) all transfer taxes; (iii) the portion of the premium for the Title Policy that is allocable to standard coverage; and (iv) one half (1/2) of the escrow fees. Buyer shall pay: (i) the portion of the premium for the Title Policy that is allocable to extended coverage and the cost of any endorsements thereto; and (ii) one half (1/2) of the escrow fee. Any other expenses of the escrow for the sale shall be paid by Buyer and Seller in accordance with customary practice as determined by Title Company. Each party shall bear its own legal fees and due diligence costs in connection with the sale.
- (c) The provisions of this Section 8.5 shall survive the Closing.

## **ARTICLE IX MISCELLANEOUS**

### **Section 9.1 Notices.**

Any notices required or permitted to be given hereunder shall be given in writing and shall be delivered (a) in person, (b) by certified mail (postage prepaid, return receipt requested), (c) by a commercial overnight courier that guarantees next day delivery and provides a receipt, (d) by fax with confirmation of receipt, or (e) by email. Notices shall be addressed as follows:

To Buyer: Heyden Properties, LLC  
Attn: Wes Heyden  
1215 Aaron Drive  
Richland, WA 99352  
Fax: (509)  
Email: [wes@roasterscoffee.net](mailto:wes@roasterscoffee.net)

To Seller: City of Yakima  
Attn: City Manager  
129 North 2nd Street  
Yakima, WA 98901  
Fax: (509) 576-6335  
Email: [cliff.moore@yakimawa.gov](mailto:cliff.moore@yakimawa.gov)

With a copy to:

Jeff Cutter  
City Attorney  
City of Yakima Legal Department  
200 South Third Street, 2<sup>nd</sup> Floor  
Yakima, WA 98901-2830  
Fax: (509) 575-6160  
Email: [jeff.cutter@yakimawa.gov](mailto:jeff.cutter@yakimawa.gov)

or to such other address as either party may from time to time specify in writing to the other party, in accordance with this section. Notices delivered in person, by certified mail or by a courier shall be effective upon delivery or refusal to accept delivery. Notices sent by fax shall be effective upon the date of transmission as shown by the sending party's fax machine. Notices sent by email shall be effective upon the date of transmission as shown by the sending party's email program.

### **Section 9.2 Entire Agreement.**

This Agreement, together with the Exhibits hereto, contains all representations, warranties and covenants made by Buyer and Seller and constitutes the entire understanding between the parties hereto with respect to the subject matter hereof. Any prior correspondence, memoranda or agreements are replaced in total by this Agreement together with the Exhibits hereto.

### **Section 9.3 Entry and Indemnity.**

During the Contingency Period, and thereafter until the Closing if Buyer elects to proceed with the purchase after the end of the Contingency Period, Seller shall provide Buyer with full access to the Property, and the records of Seller relating thereto. Buyer shall have the right to perform and conduct all surveys, tests and studies that Buyer deems appropriate in its evaluation of the Property. In connection with any entry onto the Property prior to Closing by Buyer, or its agents, employees or contractors, Buyer shall give Seller reasonable advance notice of such entry. Buyer's contractors entering onto the Property shall maintain commercial general liability insurance in amounts adequate to insure against all liability of such contractors arising out of any entry onto or inspections of the Property pursuant to the provisions hereof, and Buyer shall provide Seller with evidence of such insurance coverage upon request by Seller (including certificates of insurance showing Seller as an additional insured). Buyer shall indemnify and hold Seller harmless from and against any costs, damages, liabilities, losses, expenses, liens or claims (including, without limitation, reasonable attorney's fees), arising out of or relating to any entry on the Property by Buyer, its agents, employees or contractors in the course of performing the inspections, testing or inquiries provided for in this Agreement. The foregoing indemnity shall not extend to any diminution in value of the Property arising from the discovery or reporting of adverse information concerning the Property. The foregoing indemnity shall survive beyond the Closing or, if the sale is not consummated, beyond the termination of this Agreement.

### **Section 9.4 Time.**

Time is of the essence in the performance of each of the parties' respective obligations contained herein.

### **Section 9.5 Attorneys' Fees.**

If either party hereto fails to perform any of its obligations under this Agreement or if any dispute arises between the parties hereto concerning the meaning or interpretation of any provision of this Agreement, then the defaulting party or the party not prevailing in such dispute, as the case may be, shall pay any and all costs and expenses incurred by the other party on account of such default and/or in enforcing or establishing its rights hereunder, including, without limitation, court costs and reasonable attorneys' fees and disbursements, reasonable costs and attorneys' fees incurred in collecting any judgment or award resulting from such dispute, if any.

### **Section 9.6 Assignment.**

Subject to Section 9.13, neither party may assign its rights and obligations hereunder without the prior written consent of the other party; provided, however, that Buyer may assign its rights and obligations hereunder, without Seller's consent, to an entity which is owned or controlled, respectively, by Buyer or in which Buyer is the managing member (a "Permitted Assignment"). No assignment (other than a Permitted Assignment by Buyer) shall release the assigning party from its obligations or liabilities hereunder accruing from and after any such assignment. Subject to the provisions of this Section, this Agreement shall inure to the benefit of and be binding upon the parties hereto and their respective successors and assigns.

### **Section 9.7 Counterparts.**

This Agreement may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument. Counterpart signature pages may be detached from separately delivered counterparts of this Agreement and attached to other, identical counterparts of this Agreement, or to a version of this Agreement that is identical to that from which the signature page was detached, in order to create a fully executed original version of this Agreement. Faxed and emailed signature pages shall be deemed originals for all purposes.

### **Section 9.8 Governing Law.**

This Agreement shall be governed by and construed in accordance with the laws of the State of Washington.

### **Section 9.9 Interpretation of Agreement.**

The article, section and other headings of this Agreement are for convenience of reference only and shall not be construed to affect the meaning of any provision contained herein. Where the context so requires, the use of the singular shall include the plural and vice versa and the use of the masculine shall include the feminine and the neuter. The term "person" shall include any individual, partnership, joint venture, corporation, trust, unincorporated association, any other entity and any government or any department or agency thereof, whether acting in an individual, fiduciary or other capacity. The term "business days" means Monday through Friday, but excluding State and Federal holidays. If the end of the Contingency Period, the Closing Date or any other deadline under this Agreement falls on a day that is not a business day, then such date or deadline shall be moved to the next following business day. Unless otherwise provided, the term "including" is used in its



inclusive sense, and not in limitation, regardless of whether the words "without limitation" (or words of similar import) are used.

#### **Section 9.10 Amendments.**

This Agreement may be amended or modified only by a written instrument signed by Buyer and Seller.

#### **Section 9.11 No Partnership.**

The relationship of the parties hereto is solely that of seller and buyer with respect to the Property and no joint venture or other partnership exists between the parties hereto. Neither party has any fiduciary relationship hereunder to the other.

#### **Section 9.12 No Third Party Beneficiary.**

The provisions of this Agreement are not intended to benefit any third parties.

#### **Section 9.13 Cooperation in Exchange.**


The parties acknowledge and agree that either party may assign its interest in this Agreement to an exchange facilitator for the purpose of completing an exchange of the Property in a transaction which will qualify for treatment as a tax deferred exchange pursuant to the provisions of Section 1031 of the Internal Revenue Code of 1986 and applicable state revenue and taxation code sections (a "1031 Exchange"). The parties agree to cooperate with one another in implementing any such assignment and 1031 Exchange, provided that such cooperation shall not entail any additional expense or cause any liability whatsoever beyond the cooperating party's existing obligations under this Agreement. An assignment to an exchange facilitator shall not relieve the assigning party from any of its obligations hereunder or entitle the assigning party to extend the Closing Date, nor shall the ability to consummate a 1031 Exchange be a condition to the performance of the obligations under this Agreement by the party seeking to achieve a 1031 Exchange. Any party requesting the cooperation of the other party in any such 1031 Exchange shall save, protect, defend, indemnify and hold the other party harmless from any and all costs, losses, claims, liabilities, causes of action, fines, penalties and other expenses (including, without limitation, reasonable attorneys' fees and court costs and expert fees) incurred by such cooperating party as a result of such cooperation.

The parties hereto have executed this Agreement as of date set forth in the first paragraph of this Agreement.

#### **BUYER:**

#### **HEYDEN PROPERTIES, LLC**

a Washington limited liability company

By:   
\_\_\_\_\_  
Wes Heyden  
President

#### **SELLER:**

#### **CITY OF YAKIMA**

a Washington municipal corporation

By: \_\_\_\_\_  
Cliff Moore  
City Manager

## **LIST OF EXHIBITS**

Exhibit A	Real Property Description
Exhibit B	Due Diligence Materials
Exhibit C	List of Contracts
Exhibit D	Form of Deed
Exhibit E	Assignment of, Contracts, Warranties and Intangible Property

**EXHIBIT A**  
**REAL PROPERTY DESCRIPTION**

**EXHIBIT B**  
**DUE DILIGENCE MATERIALS**

1. Current preliminary title report, including copies of all recorded documents affecting the Property and a plan showing the site and all easements thereon
2. Maintenance agreements and all service contracts applicable to the Property.
3. Copies of all licenses and permits regarding the Property to the extent in Seller's or its property manager's possession.
4. ALTA survey, engineering and soil reports and any asbestos, toxic waste, or environmental reports previously made regarding the Property, including, but not limited to all Department of Ecology findings, studies, reports and corrective action.
5. A copy of Seller's policy of title insurance.
6. Phase I environmental report and any other environmental reports in Seller's possession or control.
7. Copies of any notices or ordinances relating to work necessary to comply with governmental regulations.
8. Copies of current tax bills and insurance policies for fire and property insurance.

**EXHIBIT C**  
**LIST OF CONTRACTS**

(Show: (i) date of Contract and each amendment; (ii) name of vendor; (iii) type of service; (iv) termination date of the Contract; (v) monthly charge or other basis for calculating amounts to become due thereunder; and (vi) terms of cancellation by either party).

**EXHIBIT D**  
**FORM OF DEED**

**RECORDING REQUESTED BY AND  
WHEN RECORDED MAIL TO  
AND MAIL TAX STATEMENTS TO:**

Wes Heyden  
c/o Heyden Properties, LLC  
1215 Aaron Drive  
Richland, WA 99352

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(Above Space for Recorder's Use Only)

**STATUTORY WARRANTY DEED**

FOR A VALUABLE CONSIDERATION, RECEIPT OF WHICH IS HEREBY ACKNOWLEDGED, \_\_\_\_\_ ("Grantor"), hereby grants to \_\_\_\_\_ ("Grantee"), all right, title and interest in that certain real property described in Exhibit A attached hereto and made a part hereof.

DATED:\_\_\_\_\_.

GRANTOR:

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

**ACKNOWLEDGMENT**

STATE OF WASHIGNTON                    )  
  ) ss.  
COUNTY OF \_\_\_\_\_                  )

On \_\_\_\_\_, 2019, before me, \_\_\_\_\_,  
personally appeared known to me to be the person whose name is subscribed to the within  
instrument and acknowledged to me that he executed the same in his authorized capacity, and that  
by his signature on the instrument the person, or the entity upon behalf of which the person acted,  
executed the instrument.

WITNESS my hand and official seal.

Signature \_\_\_\_\_ (SEAL)

**EXHIBIT E**  
**ASSIGNMENT OF, CONTRACTS, WARRANTIES AND**  
**INTANGIBLE PROPERTY**

THIS ASSIGNMENT OF CONTRACTS, WARRANTIES AND INTANGIBLE PROPERTY (this "Assignment") is made and entered into as of \_\_, 2019, by and between \_\_\_\_ (Assignor), and \_\_\_\_\_ ("Assignee").

This Assignment is given pursuant to that certain Agreement of Purchase and Sale dated \_\_\_\_\_, 2019, by and between Assignor and Assignee (the "Purchase Agreement"). All capitalized terms used but not defined herein shall have the meanings assigned to such terms in the Purchase Agreement.

For good and valuable consideration paid by Assignee to Assignor, the receipt and sufficiency of which are hereby acknowledged by Assignor, Assignor does hereby assign, transfer, set over and deliver unto Assignee all of Assignor's right, title, and interest in (i) those certain contracts (the "Contracts") listed on Exhibit C attached hereto, (ii) those certain warranties held by Assignor (the "Warranties") listed on Exhibit C attached hereto, and (iii) the Intangible Property.

Except as otherwise expressly provided in the Purchase Agreement, Assignee assumes, effective as of the Closing (as defined in the Purchase Agreement), the payment and performance of, and agrees to pay, perform and discharge, all the debts, duties and obligations to be paid, performed or discharged from and after the Closing, to the extent the same arise on or after the Closing, by (a) the owner under the Contracts, Warranties and/or the Intangible Property. Assignee agrees to indemnify, hold harmless and defend Assignor from and against any and all claims, losses, liabilities, damages, costs and expenses (including, without limitation, reasonable attorneys' fees) resulting by reason of the failure of Assignee to pay, perform or discharge any of the debts, duties or obligations assumed by Assignee hereunder, to the extent the same arise on or after the Closing. Assignor agrees to indemnify, hold harmless and defend Assignee from and against any and all claims, losses, liabilities, damages, costs and expenses (including, without limitation, reasonable attorneys' fees) arising out of or relating to the Contracts, the Warranties and the Intangible Property arising or required to be paid, performed or discharged prior to the Closing.

All of the covenants, terms and conditions set forth herein shall be binding upon and shall inure to the benefit of the parties hereto and their respective successors and assigns. This Assignment may be executed in two or more counterparts, each of which shall be deemed an original, but all of which taken together shall constitute one and the same instrument.

IN WITNESS WHEREOF, Assignor and Assignee have caused this Assignment to be executed on the day and year first above written.

ASSIGNOR:

ASSIGNEE:

\_\_\_\_\_

\_\_\_\_\_

By: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Title: \_\_\_\_\_