

ECONOMIC DEVELOPMENT AND DEFERRAL AGREEMENT

This Economic Development and Deferral Agreement (“Agreement”) is made and entered into on this ____ day of _____, 2018 (“Effective Date”) in accordance with Arizona Revised Statutes (A.R.S.) § 9-500.05 and § 9-500.11, by and between Botanical Food Company, Inc., a Delaware corporation (“Gourmet Garden”), and the City of Yuma, an Arizona municipal corporation (“City”) concerning an economic incentive package from the City to Gourmet Garden for locating a plant/facility in Yuma, Arizona. Gourmet Garden and City may be referred to individually in this Agreement as a “Party” or collectively as the “Parties.”

RECITALS

WHEREAS, it is important to the City to obtain the public benefits which accrue from investment in, and the development of, real property; the public benefits from creation of new employment opportunities; and the public benefits from retention of both new and existing jobs in the Yuma area; and,

WHEREAS, Gourmet Garden is emerging as a global leader in the preparation of herbs and spices, processing, packaging and distributing products throughout the world; and,

WHEREAS, Gourmet Garden is purchasing approximately 20.22 acres of land in Yuma, Arizona (Yuma Commerce Center) for the construction and operation of a Gourmet Garden plant/facility (the “Facility”), which will service Gourmet Garden operations; and,

WHEREAS, Gourmet Garden’s Facility will be constructed, developed and situated at 7800 E 30th Street, Yuma, Arizona 85365, legally described in Exhibit “A” (the “Property”), with an initial capital investment of approximately \$38.5 million dollars; and,

WHEREAS, Gourmet Garden’s Facility will be approximately 100,000 square feet with the option for an expansion of an additional 100,000 square feet; and,

WHEREAS, Gourmet Garden’s Facility will employ a minimum of eighty-nine (89) full-time employees within three years, with an estimated average annual wage of \$43,270; and,

WHEREAS, an Economic Impact Report (“EIR”) prepared by Greater Yuma Economic Development Corporation indicates Gourmet Garden’s development of the Property and opening of its Facility will result in an estimated \$358,700 in direct City revenues over three years, additional County and School District direct revenues of approximately \$782,100 for a total local revenue impact of \$1.14 million over the same three (3) year period plus an estimated \$837,200 in State Sales Tax revenues; and,

WHEREAS, the EIR also indicates that, over the initial three (3) year period of operation, Gourmet Garden’s Facility will have an economic impact of approximately \$95.6 million within the Yuma area, which includes, but is not limited to, the construction of the Facility, the employment of new employees and the operation of the Facility and associated operation of Gourmet Garden’s suppliers; and,

WHEREAS, the Property is presently unimproved and will require a significant investment in infrastructure, plant, and equipment by Gourmet Garden; and,

WHEREAS, the City has determined that the development of the Property pursuant to this Agreement will result in significant planning, economic, social and other public purpose benefits to the City and City residents by, among other things: (i) providing for the development of the Facility; (ii) increasing tax revenues to the City arising from or relating to the improvements to be developed on the Property; (iii) retaining existing and creating new jobs within the City and otherwise enhancing the economic and social welfare of the residents of the City; (iv) the stimulation of additional economic development, business opportunities, housing construction, and additional jobs created within the City; and,

WHEREAS, the City recognizes the national and global nature of the herbs and spices industry and that Yuma and the Yuma workforce must compete with other communities in order to foster and attract this type of job creation; and,

WHEREAS, in the current economic environment, the City has also made it a City priority to encourage and promote retention of job opportunities and increased commerce; and,

WHEREAS, based on the commitment Gourmet Garden will make to the Yuma community and in consideration for the direct benefits resulting from the development of the Facility, City staff recommends various economic development incentives, including a reduction of plan review, building permit, and development fees, an economic incentive based on achievement of a threshold number of employees, and a reimbursement related to the City transaction privilege tax paid on new construction ("City 1.7%"); and,

WHEREAS, the City Council finds that based upon the EIR, the proposed economic incentive is anticipated to raise more direct revenue than the amount of the incentive over the term of this Agreement; and,

WHEREAS, the City Council finds that in the absence of the proposed incentive, Gourmet Garden would not have chosen to locate the Facility in the City of Yuma in the same time, place or manner; and,

WHEREAS, development of the Property is vital, in the best interests of the City, the welfare of City residents, and will be developed in accordance with the public purposes and provisions of all federal, state, and local laws, codes and regulations, the General Plan, the zoning ordinance of the City of Yuma (collectively "Applicable Laws"), and the terms of this Agreement.

NOW, THEREFORE, in consideration of the foregoing recitals and the mutual terms and conditions contained in this Agreement, the sufficiency of which is acknowledged, the Parties agree as follows:

AGREEMENT

1. **Incorporation of Recitals.** The Recitals set forth above are true and accurate and incorporated by reference.

2. **Term.** This Agreement shall commence upon the date of execution by both Parties (“Effective Date”) and shall terminate on the later of: (i) three years after the Effective Date or (ii) the completion of all covenants, conditions and obligations of both Parties.

3. **Development of the Property.** Gourmet Garden shall make an initial capital investment of at least \$38.5 million for the acquisition, design, development, equipping, and construction of the improvements on the Property, including a 100,000 square foot Facility. Construction of the Facility will start within six (6) months after the Effective Date and shall be in accordance with a City approved site plan (“Site Plan”), construction or building permits and other requirements, and all Applicable Laws. Gourmet Garden shall be deemed to have started or commenced construction of the Facility upon (i) the execution by Gourmet Garden of a construction contract for the Facility or any portion thereof and (ii) the issuance by the City of any permit. Operations of the Facility shall commence within two (2) years of issuance of the building permit for the Facility. Gourmet Garden shall be deemed to have commenced operation of the Facility upon the occupancy or use of the Facility by any employee of Gourmet Garden for any component of Gourmet Garden’s business including, without limitation in any way, any sales, procurement of materials, production, packaging, shipping or other processing. Notwithstanding any provision of this Agreement to the contrary, Gourmet Garden shall not be obligated to construct the Facility. If Gourmet Garden fails to commence construction of the Facility within six (6) months after the Effective Date (as such deadline may be extended by the City), and no fees or credits have been issued to Gourmet Garden by the City, then City, as its sole remedy, may terminate this Agreement effective one hundred twenty (120) days following delivery of written notice to Gourmet Garden, unless within such time period Gourmet Garden commences the construction of the Facility. If Gourmet Garden fails to commence construction of the Facility within six (6) months after the Effective Date (as such deadline may be extended by the City), and the City has issued any fees or credits to Gourmet Garden under this Agreement, then City may terminate this Agreement effective one hundred twenty (120) days following delivery of written notice to Gourmet Garden and Gourmet Garden shall promptly return and refund any and all fees or credits issued to Gourmet Garden under this Agreement, unless within such time period Gourmet Garden commences the construction of the Facility. The periods and deadlines set forth in this Section 3 shall be extended on a day-for-day basis during any occurrence, and during the continuance of, any Force Majeure Event. Gourmet Garden shall notify City of the occurrence of a Force Majeure Event affecting such time periods and/or deadlines. “Force Majeure Event” means any event which prohibits or materially interferes with, delays or alters the performance of the applicable duty under this Agreement, including, but not limited to the following: strikes or lockouts; unanticipated shortages of material or labor (excluding those caused by lack of funds); acts of the public enemy; confiscation or seizure by any government or public authority; injunction, restraining order or other court order or decree, initiative or referendum action; wars or war-like action (whether actual and pending or expected, and whether de jure or de facto); blockades; insurrections; riots; civil disturbances; and acts of God; but excluding delays caused by lack of funds.

4. **Air Quality and Emission.** Gourmet Garden's Facility shall be constructed and any necessary equipment installed to minimize and contain odor concentration within the Property boundary. Gourmet Garden shall follow industrial best practices, for example, dilution, venting, scrubbing or other measures to minimize the impact on surrounding properties. Gourmet Garden will acquire any necessary air quality discharge permits from the appropriate agency.

5. **Development Rights; No Conditional Use Permit Necessary.** In consideration of the expenditures to be made by Gourmet Garden, the rights of Gourmet Garden to use the Facility and Property for the use intended under this Agreement shall be deemed contractually vested as of the Effective Date and Gourmet Garden and successor owners shall have a right to undertake the development and use of the Property in accordance with the terms of this Agreement. The City has determined that the intended use by Gourmet Garden does not require a Conditional Use Permit ("CUP"); this Agreement satisfies any CUP conditions and no CUP shall be required by the City.

6. **Encroachment and Right-of-Way Permits and Licenses Required.** Gourmet Garden acknowledges and agrees that any work performed in the public right-of-way, or the construction, installation or maintenance of any facility or other improvement in the public right-of-way requires a permit, license, franchise, or similar authorization issued by the controlling agency (the "Permitting Agency") through the Permitting Agency's normal and customary process for such issuance. Gourmet Garden further acknowledges and agrees that City approval of any Site Plan over all or any portion of the Property does not constitute authorization for work or improvements in the public right-of-way or any grant or waiver of any permitting requirements of the Permitting Agency. Gourmet Garden shall meet all permitting requirements of the Permitting Agency, and shall obtain all necessary permits prior to commencing such work or improvements in the public right-of-way. To the extent possible to assist Gourmet Garden with the development of the Facility, City agrees to expedite (i) the Site Plan review and approval process, (ii) the review and approval of Gourmet Garden's plans and specifications and (iii) the processing of applications for building permits ("Development Requests"). To facilitate the expedited review of Development Requests related to the development of the Facility, the City shall designate one or more of its planning, engineering, inspection, and development staff to be responsible for overseeing Development Requests related to development of the Facility, but shall not be required to dedicate staff exclusively to receipt, review or processing of such Development Requests. The designation provided for herein shall be made following the City's receipt of the first Development Request related to the Facility.

7. **Deferral of Development Fees, Water and Sewer Capacity Fees and Charges.** No water system development charge or sanitary sewer interceptor charge will be due on the Property at the time of water meter installation as the initial developer of the Property has already installed this infrastructure. Pursuant to the City of Yuma Utility Regulations, however, payback amounts of approximately \$73,900.76 (Water Payback # 815) and \$59,386.68 (Sanitary Sewer Payback #453) attributable to prior sewer or water line extensions, shall be paid in full at the time of issuance of any water meter. All City of Yuma Development Fees and water and sanitary sewer capacity and connection charges for new construction, unless deferred, shall be

paid at the time of issuance of a water meter or construction permit, including the streets facilities development fee, the police facilities development fee, the fire facilities development fee, and the general government facilities development fee. The City of Yuma Development Fees and water and sanitary sewer capacity and connection charges for new construction eligible for deferral are estimated to be: (i) \$68,065.00 related to City of Yuma Development Fees, (ii) \$56,656.00 for water capacity and connection charges, and (iii) \$57,808.00 for sanitary sewer capacity and connection charges. Deferral shall be accomplished in accordance with the following procedure.

7.1 **Deferral Eligibility.** City of Yuma Development Fees and water and sanitary sewer capacity charges shall be due and payable at the rate in existence at the time of issuance of the construction permit or water meter (whichever occurs first), but may be deferred and amortized over three (3) equal annual installments. The first installment payment shall be due and payable on the date the certificate of occupancy is issued for the Facility with two (2) additional annual installment payments being due and payable on each one-year anniversary of the certificate of occupancy date for the next two (2) years.

7.2 **Application.** At the time of application for a building permit or water meter, Gourmet Garden shall submit and sign a Request for Deferral of City of Yuma Development Fees and/or Water and Sewer Capacity Charges. The deferred amount shall be calculated, signed by Gourmet Garden and the City Administrator or his designee, and shall constitute an enforceable contract for the payment to the City of all deferred amounts in accordance with the terms described in Section 7.1. The completed Request for Deferral of City of Yuma Development Fees and Water and Sewer Capacity Charges, together with this Development Agreement, shall serve as the security required by statute for payment thereof and to the fullest extent provided by law, a non-dischargeable lien on the Property until paid in full. In the event of bankruptcy proceedings, the Parties agree that the City shall have no obligation to provide the Property with continued water or sewer service without payment in full to the City of all deferred amounts.

7.3 **Deferred Amounts Due Upon Assignment or Transfer.** Notwithstanding any assignment contract or agreement to the contrary, upon any assignment or transfer of any lot, part or portion of the Property (other than a deed of trust to secure financing, any grant of an easement or similar right to the Property or any taking or condemnation of all or any portion of the Property or transfer by deed-in-lieu thereof), all deferred amounts owed to the City shall be paid in full prior to recording any assignment contract, deed or agreement transferring an interest in the Property.

8. **Payment of Economic Incentive.** Within eighteen (18) months after issuance of a certificate of occupancy, upon submittal by Gourmet Garden and City review of satisfactory documentation demonstrating that the Target Employment (as defined in Section 8.1 below) has been sustained for a continuous twelve (12) months by Gourmet Garden, the City shall pay Gourmet Garden the sum of fifty-five thousand dollars (\$55,000.00) (the “Economic Incentive”).

8.1 **Target Employment.** Gourmet Garden will achieve a target employment of 89 full time equivalent (“FTE”) jobs (as defined by the US Department of Housing and Urban Development) at the Facility. The 89 FTE jobs will pay no less than an average of \$20.80 per hour, and will include employer-paid health benefits of at least 65% of the costs for each employee that elects such coverage under the employer’s health insurance plan (“Target Employment”). The annual payroll for the Gourmet Garden Facility will be at least \$3,851,000 dollars per year at full operation (2020).

8.2 **Documentation.** Gourmet Garden acknowledges that the City is subject to Arizona public records laws and will have the right to request additional documentation or copies of documents relating to the Target Employment from Gourmet Garden during the term of this Agreement. If proprietary, trade secret or confidential information is requested by the City, Gourmet Garden shall so inform the City of the nature of the documents requested and shall not be required to deliver such proprietary, trade secret or confidential information. In certain cases, an abstract of such information, acceptable to both Parties and verified by the City, together with a review of the proprietary, trade secret or confidential documents at Gourmet Garden’s Facility by a City designated representative, may be substituted in lieu of actual City receipt of copies of proprietary, trade secret or confidential documents. Proprietary, trade secret or confidential documents shall not include: (1) information which is available to the general public at the time of this Agreement; (2) information which becomes available to the general public through no fault of the City; or (3) information which was disclosed to the City by a third-party who had the lawful right to disclose the information.

9. **Credit for Permit and City of Yuma Development Fees.** The City shall credit Gourmet Garden a total amount of up to \$40,000.00 towards plan review and building permit fees, and up to \$40,000.00 in City of Yuma Development Fees associated with the construction and development of the Facility. The plan review and building permit fee credit may be taken upon each request or submission of plans by Gourmet Garden to the City until the entire credit has been utilized by Gourmet Garden. City of Yuma Development Fees will be credited upon each request or application for issuance of a building permit until the entire credit has been utilized by Gourmet Garden.

10. **City 1.7% Transaction Privilege Tax Reimbursement on Construction.** The City agrees to reimburse Gourmet Garden an amount up to \$85,000.00 upon submittal to the City Finance Director of satisfactory documentation from Gourmet Garden or Gourmet Garden’s contractor verifying payment of the City 1.7% transaction privilege tax paid for new construction on the Property. Notwithstanding any other term in this Agreement, this Section 10 shall expire three years from the Effective Date; provided, however, Gourmet Garden shall be entitled to such reimbursement under this Section 10 following expiration of the three year period from the Effective Date so long as satisfactory documentation from Gourmet Garden or Gourmet Garden’s contractor has been submitted to the City within such three-year period.

11. **Development Standards and Requirements.** Gourmet Garden’s Facility shall be designed, constructed, and inspected in accordance with Applicable Laws and City procedures for approving the design and inspection of construction. Unless specifically provided for in

Section 9 of this Agreement, Gourmet Garden will be responsible for all costs associated with the Facility, including the following additional noted requirements:

11.1 **Utilities.** Water capacity and sanitary sewer capacity charges will be based on the number and size of meters requested. Gourmet Garden will be responsible for the installation of all new utility service lines including water service, fire protection, and sanitary sewer connections, and must meet all pretreatment requirements in accordance with Applicable Laws. A sanitary sewer sampling vault will be required for all process water discharge. Gourmet Garden may, but shall not be required to, install metering for process water discharge.

11.2 **Building Safety.** A separate mechanical permit for all processing equipment may be issued at the request of Gourmet Garden, but is not required. Processing equipment, including electrical components, must be in compliance with the 2012 International Mechanical Code as adopted by the City. *See City Code § 150-045.*

11.3 **Fire Department.** A fire sprinkler system with occupant notification, fire alarm, and offsite monitoring is required. All fire hydrants must be installed to provide adequate fire flow and hydrant spacing in accordance with City standards and must be operational before vertical construction begins. Flow test and design hazard sealed by an Arizona Registrant will be required for deferred submittal of fire sprinkler plans. The Property will need to have secondary access, and may require a fire department turnaround. Fire protection plans must be submitted with original architectural plan submission including hydraulic calculations on blue line copies, unless utilizing a deferred submittal. On-site fuel storage requires special permitting by the Fire Department and the Arizona Department of Environmental Quality (ADEQ). If hazardous materials will be used or stored on the Property, special requirements such as an inventory statement and storage plan may be required.

11.4 **Lighting.** Any on-site lighting of parking lots, exterior walkways or other exterior spaces shall consist of LED lights of 3000 Kelvins or less color and down-lighting fixtures shall be utilized to comply with the City's dark-sky ordinance. Mast heads, poles and fixtures shall be of an approved type in accordance with City construction standards. If Gourmet Garden elects to install any streetlights along 30th Street, the 3000 Kelvin and down-lighting fixture standards shall also apply to such streetlights. Gourmet Garden shall not be required to install any streetlights along 30th Street in connection with the development of the Facility.

12. **Cooperation in Development Approvals.** Subject to the terms of this Agreement and compliance with Applicable Laws including, without limitation City's compliance with all required notice and public hearing requirements, City and Gourmet Garden will cooperate reasonably in processing the approval or issuance of any permits, plans, specifications, plats or other development approvals requested by Gourmet Garden in connection with development of the Property. To the extent possible to assist Gourmet Garden with the development of the Facility, City agrees to expedite Development Requests in the manner set forth in Section 6 above.

13. **Default.** If either Party defaults (the “Defaulting Party”) with respect to any of such party’s obligations, then the other Party (the “Non-Defaulting Party”) shall give written notice in the manner described in Section 21 below to the Defaulting Party. The notice shall state the nature of the default claimed and make demand that such default be corrected. The Defaulting Party shall then have:

a. Thirty (30) days from the date of receipt of such notice within which to correct such default if it can be reasonably corrected by the payment of money, or

b. Sixty (60) days from the date of receipt of such notice to cure such default if action other than payment of money is reasonably required, or

c. If any such non-monetary default cannot reasonably be cured within sixty (60) days for reasons beyond the defaulting Party’s control (financial inability, construction delays and market conditions excepted), then such longer period as may be reasonably required, provided and so long as such cure is promptly commenced within such period and diligently prosecuted to completion.

14. **Remedies.** If the default is not corrected within the time periods described in Section 13 above, the Non-Defaulting Party shall have all remedies available to it at law or in equity, subject to the limitations set forth herein. Gourmet Garden or City, or any successor-in-interest or assignee, may institute a legal action to cure, correct or remedy any default, to enforce any covenant or agreement herein, or to enjoin any threatened or attempted violation, including but not limited to suits for declaratory relief, specific performance, relief in the nature of mandamus and actions for damages, provided that claims for damages shall be limited to actual damages as of the time of entry of judgment. The Parties hereby waive any right to seek consequential, punitive, multiple, exemplary or any damages other than actual damages.

15. **Delays; Waivers.** Except as otherwise expressly provided in this Agreement, any delay by any Party in asserting any right or remedy under this Agreement shall not operate as a waiver of any such rights or limit such rights in any way; and any waiver in fact made by such Party with respect to any default by the other Party shall not be considered as a waiver of rights with respect to any other default or with respect to the particular default except to the extent specifically waived in writing. It is the intent of the Parties that this provision will enable each Party to avoid the risk of being limited in the exercise of any right or remedy provided in this Agreement by waiver, laches or otherwise at a time when it may still hope to resolve the problems created by the default involved.

16. **Rights and Remedies Cumulative.** The rights and remedies of the Parties are cumulative, and the exercise by either Party of any one or more of such rights shall not preclude the exercise by it, at the same or different times, of any other right or remedy for any other default by the other Party

17. **Gourmet Garden’s Representations.** Gourmet Garden represents and warrants that:

a. Gourmet Garden has the full right, power and authorization to enter into and perform this Agreement, the obligations and undertakings of Gourmet Garden under this Agreement, and the execution, delivery and performance of this Agreement by Gourmet Garden has been duly authorized, agreed to, and is in compliance with any organizational documents of Gourmet Garden.

b. All consents and approvals necessary to the execution, delivery and performance of this Agreement have been obtained, and no further action needs to be taken in connection with such execution, delivery and performance.

c. Gourmet Garden will execute and acknowledge when appropriate all documents and instruments and take all actions reasonably necessary to implement, evidence and enforce this Agreement.

d. As of the date of this Agreement, Gourmet Garden knows of no litigation, proceeding or investigation pending or threatened against or affecting Gourmet Garden, which could have a material adverse effect on Gourmet Garden's performance under this Agreement that has not been disclosed in writing to the City.

e. This Agreement (and each undertaking of Gourmet Garden contained herein) constitutes a valid, binding and enforceable obligation of Gourmet Garden according to its terms, except to the extent limited by bankruptcy, insolvency and other laws of general application affecting creditors' rights and by equitable principles, whether considered at law or in equity.

f. The execution, delivery and performance of this Agreement by Gourmet Garden is not prohibited by, and does not conflict with, any other agreements, instruments, judgments or decrees to which Gourmet Garden is a party or to which Gourmet Garden is otherwise subject.

g. Gourmet Garden has not paid or given, and will not pay or give, any third party any money or other consideration for obtaining this Agreement other than normal costs of conducting business and costs of professional services such as the services of architects.

h. Gourmet Garden has had opportunity for independent legal review of this Agreement by counsel of its choosing prior to the execution hereof.

18. **City Representations.** City represents and warrants to Gourmet Garden that:

a. City has the right, power and authorization to enter into and perform this Agreement and each of City's obligations and undertakings under this Agreement, and City's execution, delivery and performance of this Agreement have been duly authorized and agreed to in compliance with the requirements of the Yuma City Charter and the Yuma City Code.

b. All consents and approvals necessary to the execution, delivery and performance of this Agreement have been obtained, and no further action needs to be taken in connection with such execution, delivery and performance.

c. City will execute and acknowledge when appropriate all documents and instruments and take all actions reasonably necessary to implement, evidence and enforce this Agreement.

d. City knows of no litigation, proceeding, initiative, referendum, investigation or threat of any of the same contesting the powers of City or its officials with respect to this Agreement that has not been disclosed in writing to Gourmet Garden.

e. This Agreement (and each undertaking of City contained herein), constitutes a valid, binding and enforceable obligation of City, enforceable according to its terms, except to the extent limited by bankruptcy, insolvency, referendum, and other laws of general application affecting creditor's rights and by equitable principles, whether considered at law or in equity.

f. The execution, delivery and performance of this Agreement by City is not prohibited by, and does not conflict with, any other agreements, instruments or judgments or decrees to which City is a party or is otherwise subject.

g. City has been assisted by counsel of its own choosing in connection with the preparation and execution of this Agreement.

h. Neither Gourmet Garden nor the development of the Facility are subject to the obligations set forth in (i) the Development Agreement between the City and Ingold Family Investments, LLC (as successor to Jacqueline B. Pearce and Claude Crow), recorded as Instrument No. 2004-33067; (ii) Resolution R2005-81 entered into by and between the City and Ingold Family Investments, LLC, recorded as Instrument No. 2005-38807; (iii) Addendum to Existing Development Agreement(s) with Ingold Family Limited Partnership and Ingold Family Investments entered into by and between City, Ingold Family Investments, LLC (as successor in interest to Ingold Family Limited Partnership), recorded as Instrument No. 2008-18928; (iv) Resolution No. R2006-21 entered into by and between City and Ingold Family Investments, LLC, recorded as Instrument No. 2006-07919; (v) except for the payment of payback amounts as required thereunder, Watermain Extension Agreement No. WA-815 entered into by and between City and Ingold Family Investments, LLC, dated May 27, 2008, and recorded as Instrument No. 2008-15784; and (vi) except for the payment of payback amounts as required thereunder, Sanitary Sewer Main Extension Agreement No. SWA-453, dated May 27, 2008, and recorded as Instrument No. 2008-15785.

19. **Moratorium.** In the event of any moratorium that is instituted pursuant to A.R.S. § 9-463.06, Gourmet Garden or any owner of all or any portion of the Property shall be automatically granted a waiver of the applicability of such moratorium to develop the Facility pursuant to the provisions of this Agreement, as described in A.R.S. § 9-463.06.

20. **Mutual Indemnification.** To the extent the City is named in any lawsuit, claim, demand, or action arising out of Gourmet Garden's actions in this Agreement, Gourmet Garden shall indemnify, defend, and hold harmless the City and any of its employees, officials, or officers and against any losses, costs, or damages of every kind and description, including reasonable attorneys' fees and/or litigation expenses. To the extent Gourmet Garden is named in any lawsuit, claim, demand, or action arising out of City's actions in this Agreement, City shall indemnify, defend, and hold harmless Gourmet Garden and any of its employees, officials, or officers and against any losses, costs, or damages of every kind and description, including reasonable attorneys' fees and/or litigation expenses.

21. **Notice.** All notices, demands or other communications must be in writing and are deemed duly delivered upon personal delivery, or as of the second business day after mailing by United States mail, postage prepaid, registered or certified, return receipt requested, addressed as follows:

City:

City of Yuma
Attn: City Administrator
One City Plaza
Yuma, Arizona 85364-1436

With a copy to:

City Attorney
One City Plaza
Yuma, Arizona 85364-1436

Gourmet Garden:

Botanical Food Company, Inc.
Attn: Phil Dryden
18 Loveton Circle
Sparks, MD 21152

With a copy to:

Snell & Wilmer LLP
Attn: Lawrence Brown, Esq.
One Arizona Center
Phoenix, Arizona 85004

If either Party changes address, they must give written notice to the other Party. Notice of change of address is deemed effective five (5) days after mailing by the Party changing its address.

22. **Time is of the Essence.** Time is of the essence in implementing the terms of this Agreement.

23. **Certain Terms; Joint and Several Obligations.** The terms “including” and “included” used herein are comprehensive without any limitation whatsoever. If Gourmet Garden is comprised of more than one person or entity, each of such persons or entities shall be jointly and severally obligated and liable for all duties and obligations of Gourmet Garden under this Agreement.

24. **Recordation.** The City shall record a copy of this Agreement no later than ten (10) days from date of entering into this Agreement pursuant to A.R.S. § 9-500.05.

25. **Estoppel Certificate.** The Parties agree that, upon not less than twenty one (21) business days prior written request from a Party to this Agreement, a requested Party shall execute, acknowledge and deliver to the Party making such request a written statement certifying to the current status of the Agreement, including whether or not, a Party is in default of any obligation or duty set forth within the Agreement. Any such certificate may be relied on by a prospective purchaser, or any prospective lender.

26. **No Partnership; Third-Parties.** It is not intended by this Agreement to, and nothing contained in this Agreement shall, create any partnership, joint venture or other arrangement between the Parties. Except as provided for herein, no term or provision of this Agreement is intended to, or shall, be for the benefit of any person or entity not a Party hereto, and no such other person or entity shall have any right or cause of action hereunder, except for permitted successors in interest to the extent that they assume or succeed to the rights and/or obligations under this Agreement.

27. **Rights of Lenders.** The City is aware that financing or refinancing for acquisition, development and/or construction of the Property and improvements may be provided, in whole or in part, from time to time, by one or more Third-Parties (individually a “Lender”, and collectively “Lenders”). In connection with such financing, such Lender or Lenders may have the right to assume Gourmet Garden’s, or its permitted assignees’ position with respect to this Agreement. In such event, and if there is more than one Lender, it will be necessary for the Lenders to enter into an agreement among themselves, Gourmet Garden and/or its permitted assignees, acknowledging the various rights of the Lenders and Gourmet Garden and/or its permitted assignees (the “Triparty Agreement”). The City agrees that it shall execute such Triparty Agreement only for the purpose of acknowledging the rights of such Lenders in this Agreement, provided that such Triparty Agreement imposes no additional obligations upon nor diminishes any rights of the City other than those contained within this Agreement and does not result in a novation.

In the event of an Event of Default by Gourmet Garden, the City shall provide notice of such Event of Default, at the same time notice is provided to Gourmet Garden, to not more than two (2) of such Lenders as previously designated by Gourmet Garden to receive such notice (the “Designated Lenders”) whose names and addresses were provided by written notice to the City in accordance with Section 21. The City shall give Gourmet Garden copies of any such notice provided to such Designated Lenders and, unless Gourmet Garden notifies the City that the Designated Lenders names or addresses are incorrect (and provides the City with the correct information) within three (3) business days after Gourmet Garden receives its copies of such

notice from the City, the City will be deemed to have given such notice to the Designated Lenders even if their names or addresses are incorrect. Gourmet Garden may provide notices to other Lenders. If a Lender is permitted, under the terms of a nondisturbance agreement with the City, or under a Triparty Agreement executed by the City, to cure the Event of Default and/or to assume Gourmet Garden's position with respect to this Agreement, the City agrees to recognize such rights of the Lender or Lenders under the Triparty Agreement, and to otherwise permit each such Lender to assume all of its respective rights and obligations of Gourmet Garden under this Agreement.

28. **Assignment and Transfer.**

a. **Restrictions on Assignment and Transfer.** Except in connection with (i) obtaining financing or refinancing, (ii) the exercise of remedies by Lenders which have entered into non-disturbance agreements with the City, or (iii) a permitted assignment of Gourmet Garden's rights to an affiliate (defined as a company in which Gourmet Garden owns or controls 51% or more of the company), Gourmet Garden shall not transfer or assign all or any part of its rights or obligations under this Agreement without the prior express written consent of City, which approval may be given or withheld in the City's reasonable discretion. For the purposes of this Agreement, "transfer or assign" shall include any change in the identity of Gourmet Garden, in which event Gourmet Garden shall promptly notify City of any and all anticipated changes in advance thereof. Except as provided in this Section 28(a), no voluntary or involuntary successor in interest of Gourmet Garden shall acquire any rights or powers under this Agreement. The foregoing restrictions in this Section shall terminate two (2) years after the issuance of a certificate of occupancy for the Facility.

b. **City's Rights and Obligations.** The City's rights and obligations under this Agreement shall be non-assignable, without the prior express consent of Gourmet Garden, which consent may be given or withheld in Gourmet Garden's reasonable discretion.

29. **Good Standing; Authority.** Each of the Parties represents and warrants to the other that it is duly formed and validly existing under the laws of Arizona or registered with the Arizona Corporation Commission as a foreign corporation and that the individual(s) executing this Agreement on behalf of their respective Party is authorized and empowered to bind the Party on whose behalf each such individual is signing.

30. **Governing Law; Venue.** This Agreement shall be deemed to be made under, shall be construed in accordance with, and shall be governed by the internal, substantive laws of the State of Arizona (without reference to conflict of law principles). Any action brought to interpret, enforce, or construe any provision of this Agreement shall be commenced and maintained in the Superior Court of the State of Arizona in and for the County of Yuma (or, as may be appropriate, in the Justice Courts of Yuma County, Arizona, or in the United States District Court for the District of Arizona, if, but only if, the Superior Court lacks or declines jurisdiction over such action). The Parties irrevocably consent to jurisdiction and venue in such courts for such purposes and agree not to seek transfer or removal of any action commenced in accordance with the terms of this Section.

31. **Attorney's Fees, Costs and Expenses.** If either Party brings an action or proceeding for failure to observe any of the terms or provisions of this Agreement, the prevailing Party shall recover, as part of such action or proceeding, all reasonable costs, expenses, and attorney fees as determined by the Court and not by a jury.

32. **Entire Agreement/Integration.** This Agreement, with its Exhibits, contains the entire agreement between the Parties, and no oral or written statement, promises or inducements made by either Party or its agents not contained or specifically referred to in this Agreement is valid or binding. All modifications to this Agreement must be in writing, signed and agreed to by the Parties with the approval of City Council.

33. **A.R.S. § 38-511(F).** Notice is hereby given of the applicability of A.R.S. § 38-511.

34. **Individual Nonliability.** No City Council member, official, representative, agent, attorney or employee shall be personally liable to any of the other Parties hereto, or to any successor in interest to such Parties, in the event of any default or breach by City or for any amount which may become due to a Party or its successor, or with respect to any obligation of City under the terms of this Agreement. No officer, director, shareholder, partner, member, agent, attorney or employee of Gourmet Garden shall be personally liable to any of the other Parties hereto, or to any successor in interest to such Parties, in the event of any default or breach by Gourmet Garden or for any amount which may become due to a Party or its successor, or with respect to any obligation of Gourmet Garden under the terms of this Agreement. Notwithstanding anything contained in this Agreement to the contrary, the liability of Gourmet Garden shall be limited solely to the Property and the assets of Gourmet Garden.

35. **Headings and Counterparts.** The headings of this Agreement are for purposes of reference only and shall not limit or define the meaning of any provision of this Agreement. This Agreement may be executed in any number of counterparts, and when each Party has executed a copy thereof, such copies, taken together, shall be deemed to be a full and complete original contract between the parties. An electronic transmission or other facsimile of this Agreement shall be effective and binding upon the Parties as if such signatures were originals, and shall be admissible as evidence of the document and the signer's execution thereof; provided that such Party shall upon request of any other Party, immediately provide an original signature to such other Party.

36. **Construction.** This Agreement and the documents to be executed pursuant to this Agreement are the result of negotiations between the Parties. Accordingly, neither Party shall be deemed to be the author of this Agreement nor the resulting documents, and there shall be no presumption that this Agreement or any of such documents are to be construed for or against any such Party on the basis of the authorship of the documents. Words importing the singular number only shall include the plural and vice-versa, and words importing gender shall include all genders. Use of the word "including" shall mean "including without limitation."

37. **Severability.** If any term, covenant, condition or provision of this Agreement is declared void or unenforceable, such provision shall be severed from this Agreement, which

shall otherwise remain in full force and effect. If any applicable law or court of competent jurisdiction prohibits or excuses City or Gourmet Garden from undertaking any contractual commitment to perform under any provision hereunder, the remaining portions of this Agreement shall remain in full force and effect, and the Parties will negotiate diligently in good faith for such amendments of this Agreement as may be necessary to achieve the original intent of this Agreement, notwithstanding such invalidity or unenforceability.

38. **Amendment.** No change or addition is to be made to this Agreement except by written amendment executed by City and Gourmet Garden. Within ten (10) days after any amendment to this Agreement, such amendment shall be recorded in the Official Records of Yuma County, Arizona.

39. **Further Acts.** Each Party agrees to perform such other and further acts and to execute and deliver such additional agreements, documents, affidavits, certifications, acknowledgments and instruments as any other Party may reasonably require to consummate, evidence, confirm or carry out the matters contemplated by this Agreement.

40. **Business Days.** If the last day of any time period stated in this Agreement or the date on which any obligation to be performed under this Agreement shall fall on a Saturday, Sunday or legal holiday, then the duration of such time period or the date of performance, as applicable, shall be extended so that it shall end on the next succeeding day which is not a Saturday, Sunday or legal holiday.

41. **Successor Laws.** Each reference in this Agreement to a particular City Ordinance, Arizona statute or other Applicable Laws shall include any successor City ordinance, successor Arizona statute or successor Applicable Laws.

42. **Exhibits.** Each of the Exhibits is incorporated into the terms of this Agreement by reference.

[REMAINDER OF PAGE INTENTIONALLY LEFT BLANK]

IN WITNESS WHEREOF, the Parties have authorized the execution of this Agreement through their authorized representatives named below as of the Effective Date written above.

CITY OF YUMA

Gregory K. Wilkinson
City Administrator

ATTEST:

Lynda L. Bushong
City Clerk

APPROVED AS TO FORM:

Richard W. Files
City Attorney

State of Arizona)
) ss
County of Yuma)

The foregoing instrument was acknowledged before me this ____ of _____, 2018 by Gregory K. Wilkinson, City Administrator, on behalf of the CITY OF YUMA, an Arizona municipal corporation.

My commission expires:

By: _____
Notary Public

Exhibit A
(Legal Description of the Property)

Lot 26, Yuma Commerce Center Unit No. 2 Lot Split No. 2, according to Book 25 of Plats, page 10 and in Document No. 2008-34891, records of Yuma County, Arizona;

EXCEPT 1/16th of all minerals, oil and/or hydrocarbon substances lying in and under said land or which may be produced from said land as reserved in instrument recorded in Docket 345, page 220, records of Yuma County, Arizona.