

Prepared by and return to:
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Estero Village Attorney
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1001 S. Ft. Harrison Ave
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PUBLIC IMPROVEMENT AGREEMENT

by and between

VILLAGE OF ESTERO, FLORIDA,

and

HIGH FIVE UP TOP, LLC

PUBLIC IMPROVEMENT AGREEMENT

THIS PUBLIC IMPROVEMENT AGREEMENT (the “Agreement”) is entered into this ___ **day of May, 2024** (the “Effective Date”), by and between the **Village of Estero**, a Florida municipal corporation (the “Village”), and **High Five Up Top, LLC**, a Texas Limited Liability Corporation, to be assigned to its entities, **HD5 Entertainment, LLC**, a Texas Limited Liability Corporation authorized to conduct business in Florida and **High Five Entertainment, LLC**, a Texas Limited Liability Corporation authorized to conduct business in Florida (“collectively, “High 5”), as follows.

WHEREAS, the Village purchased a 21.21 acre parcel located at 9000 Williams Road, Estero (STRAP No.: 34-46-25-E4-0100C.0150) (the Property), which purchase was memorialized by Warranty Deed executed on June 29th 2022 and recorded on July 7th 2022 (Lee County Clerk of Court Instrument No.: 2022000223650), with the intent of improving and operating the Property to provide recreational opportunities for Village residents; and

WHEREAS, the Village Council authorized the purchase of the Property since it was the last remaining parcel along Williams Road contiguous to public properties owned by Lee County and the Lee School District, both of which have current recreational uses or designations, and the Village envisioned the creation of enhanced, first/best-in-class recreational activities for Village residents on the Property as part of a Village center Hub; and

WHEREAS, the Village Center Hub is generally defined by Corkscrew Road to the north, S. Tamiami Trail/US 41 to the west, Williams Road to the south, and River Ranch Road to the east (excluding the residential area in the northeast quadrant), and is already home to the Village’s civic uses, including the Village Hall, Estero High School, and Estero Community Park and Recreation Center; and

WHEREAS, on December 5th 2022, the Village received an unsolicited proposal from the private sector for a qualifying project, which would be the construction and operation of a Recreational and Entertainment Facility (REF) on a portion of the Property; and

WHEREAS, subsequent to its receipt of this proposal, the Village published notice that it had received the proposal and that it would accept other proposals related to the development of recreational opportunities on the Property; and

WHEREAS, based on this notice, the Village received additional proposals from the private sector for similar projects to construct and operate recreational facilities on the Property; and

WHEREAS, the Village’s staff and consultants subsequently ranked the proposals and began negotiations with the top-ranked proposers; and

WHEREAS, the Village’s consultant has performed an independent analysis of the proposed REF to be owned and operated by the Operator which demonstrates the cost-effectiveness and overall public benefit to the Village of entering this Agreement; and

WHEREAS, the Village Council determines that the project approved in this Agreement:

1. is in the public's best interest,
2. has safeguards in place to ensure that additional costs or service disruptions are not imposed on the public in the event of material default or cancellation of this Agreement by the Village, and
3. has adequate safeguards in place to ensure that the Village has the opportunity to add capacity to the proposed project or other facilities serving similar predominantly public purposes.

WHEREAS, the Village has considered the High 5 reasonable finance plan, the project costs, revenues by source, available financing, major assumptions, internal rate of return, whether governmental funds are assumed in order to deliver a cost-feasible project; and a total cash-flow analysis beginning with the implementation of the project and extending for the term of the comprehensive Agreement; and

WHEREAS, the Village Council finds that it is in the best interests of the Village, its residents, visitors and businesses, to approve this Agreement.

NOW, THEREFORE, in consideration of the foregoing exordial clauses, and the mutual covenants, obligations, duties and benefits herein set forth, the Parties agree as follows:

Article I Obligations of High 5

- A. High 5 shall design and construct the REF such that it will be wholly contained upon that portion of the Property depicted in **Exhibit "A"** (hereinafter referred to as the "Parcel"). Prior to construction, the Operator shall submit draft engineered construction plans to the Village Manager for review and approval. In reviewing such plans, the Village Manager shall ensure the design and landscaping schemes remain consistent with the aesthetic and design pattern desired by the Village, while also respecting the High 5 corporate color and design standards.
- B. High 5 shall construct the REF in accordance with the approved design plans, using appropriate licensed contractors. All applicable Florida Building Codes and Village building codes shall be followed during construction. High 5 shall enter into contracts with contractors for construction of the REF to be let in the name of High 5 (the "Construction Agreements"). High 5's engineers shall prepare and provide, or cause the preparation and provision of all contract specifications and necessary related documents. High 5 shall provide all construction documents for the REF and shall acknowledge that the Village has no obligations and liabilities thereunder. High 5 shall include a provision in the Construction Agreements for the REF that the contractor will indemnify, defend, and save harmless the Village against any costs or liabilities thereunder. The High 5 or its designee shall administer the Construction Agreements and the REF construction costs shall be paid by High 5. The Village shall have no liability for any claims that may arise out of design or construction of the REF, and the High 5 shall cause all of its contractors, architects, engineers, and consultants to agree in writing that they will look solely to the High 5, not to the Village, for payment of all costs and valid claims associated with construction of the REF.

- C. In connection with the design and construction of the REF, High 5 shall undertake the following responsibilities:
- (1) High 5 shall provide to the Village electronic copies of the plans and specifications for the REF (including revisions) as such plans and specifications are currently in existence and as completed after the date hereof, and shall provide the Village one complete set of record drawings (in electronic format) for the REF;
 - (2) In accordance with the requirements between High 5 and the Village with regard to the development and construction of the REF, High 5 or such person selected by and contracting with High 5 shall provide the Village with a copy of the detailed construction schedule outlining the major items of work of each major construction contractor, and any revisions to such schedule;
 - (3) High 5 shall provide construction documents, including the plans and specifications to the Village, signed and sealed by one or more registered professional architects or engineers licensed in the State of Florida at the time the construction documents are submitted to the Village for approval;
 - (4) High 5 shall provide the Village with reasonable advance notice of any scheduled construction meetings as set forth in the construction contracts for the REF, and shall permit the Village to attend and observe such meetings as the Village so chooses in order to monitor the progress of the construction;
 - (5) High 5 or any general contractor shall comply with, and shall require that its agents and subcontractors comply with, all applicable laws regarding the use, removal, storage, transportation, disposal and remediation of hazardous materials;
 - (6) High 5 will not during the Term permit any illegal act, trade, business, occupation or calling at any time during the Term to be exercised carried on, permitted or suffered in or on the Premises;
 - (7) High 5 or any general contractor shall notify and obtain the Village's approval for all field changes that directly result in material changes to the portion of the plans and specifications for the REF that describe the connection of such REF with streets, storm sewers and utilities; and
 - (8) Upon notice from the Village, the High 5 shall or shall cause any general contractor to promptly repair, restore or correct, on a commercially reasonable basis, all damage caused by the general contractor or its subcontractors to property or facilities of the Village during construction of the REF and to reimburse the Village for out-of-pocket costs actually incurred by the Village that are directly related to the Village's necessary emergency repairs of such damage.

- D. The REF shall be designed, constructed, and operated by High 5 in the manner set forth in its proposal to the Village (attached hereto as **Exhibit “B”**).
- E. High 5 shall:
1. Develop or operate the REF in a manner that is acceptable to the Village in accordance with the provisions of this Agreement.
 2. Maintain, or provide by contract for the maintenance or improvement of, the REF.
 3. Cooperate with the Village in making best efforts to establish interconnection between the REF and any other facility or infrastructure as requested by the Village in accordance with the provisions of this Agreement.
 4. Comply with this Agreement and any associated CAM or service contracts.
- F. High 5 shall permit the Village to inspect the REF at reasonable times to ensure that the High 5 activities are acceptable to the Village, in accordance with the terms of this Agreement.
- G. High 5 is responsible for obtaining and paying for all electric, water, telecommunications and any other necessary or desirable utility services for the REF.
- H. In performing its obligations under this Agreement, High 5 shall comply with all applicable federal, state, and local laws, and shall ensure all applicable taxes, fees and fines associated with the Parcel are paid.

Article II Obligations of Village

- A. For ten dollars (\$10) and the other consideration set forth in this Agreement, including but not limited to the Compensation to Village set forth in Article IV of this Agreement, the Village will transfer title of the Parcel to High 5 for High 5’s construction and High 5 operation of the REF. The Parties will close on the transfer of the Parcel to High 5 on or before July 15, 2024. The closing shall take place in Lee County, Florida. On the closing date, the Village shall execute and record a quit claim deed for conveyance of the Parcel. The Village shall also execute and deliver (i) a closing statement and (ii) fully executed versions of any documents reasonably required to affect the transfer of the Parcel. Notwithstanding the foregoing, in no event shall the Village be required to execute any document which requires offering or providing an opinion, warranty, or representation which exceeds the scope or knowledge of either Party. Documentary stamp tax on the deeds at nominal value will be paid by the Village for its conveyance, and High 5 shall pay for any title reports and recording charges. If High 5 fails to complete construction of the REF, or to otherwise perform its obligations under this Agreement, any and all deeds, assignments and assumptions of agreements, and any and all other documents that have been conveyed, transferred, assigned, or otherwise executed incident to this Agreement shall be reconveyed,

reassigned or otherwise transferred from High 5 back to the Village, with reconveyance being by special warranty deed, warranting against claims of all persons claiming by, through or under High 5. The value of the Parcel (“Land Value”) for the purposes of calculating the asset contribution from the Village to High 5 will be determined by the appraiser of High 5 or High 5’s primary lender.

- B. The Village will design, engineer, construct and maintain all common areas on the Property, including finished roads to High 5 pad and parking from Coconut Point and Williams Road, parking lots, utilities, stormwater retention, wayfinding signage, hardscape, and landscape areas. The Village will also design, engineer, and construct all site improvements including mass grading, public utility main lines, storm drainage, and roads, and will deliver to High 5 a pad ready site.
- C. High 5 shall have reciprocal easement rights with the Village (and other entities which may be authorized by the Village to operate on the Property) to traffic and pedestrian circulation and non-dedicated parking areas. A mutually agreeable number of parking spaces shall be dedicated to High 5 (per a separate shared parking agreement) adjacent to its building structure, and a service/delivery space will also be dedicated for use by High 5. All other parking spaces which are part of the common areas of the Property will be open to the general public, and no portion of the Property or Parcel shall be developed, advertised or used as a private club or private facility with membership restricted to any one or more classes of persons or entities.
- D. The Village will design, engineer, and construct the infrastructure required to support the desired outdoor miniature golf element according to design specifications approved by High 5.
- E. For miniature golf, Village will provide High 5 a capital contribution (“Mini Golf Cash”) of ONE MILLION TWO HUNDRED FIFTY THOUSAND DOLLARS (\$1,250,000) for an eighteen (18) hole “Mini Golf” course. Fifty percent (50%) of the Mini Golf Cash shall be paid within 30 days of execution of this Agreement, and fifty percent (50%) shall be paid within 30 days of High 5 receiving a building permit for plans which include the Mini Golf course. High 5
- F. For up to twenty-one (21) pickleball courts, Village will provide High 5 a capital contribution (“Pickleball Cash”) of FIVE MILLION DOLLARS (\$5,000,000). The Pickleball Cash shall be paid within 30 days of High 5 receiving a building permit for plans which include the pickleball courts.
- G. Together, the Mini Golf Cash and Pickleball Cash, along with the Land Value, shall be referred to as The Capital Contribution (“The Capital Contribution”).
- H. While the Village’s ultimate annual budget allocations are subject to the budgets adopted by the Village Council under Florida’s statutory budgeting process, the Village intends to use proceeds from its priority distribution referenced in Section IVB below to pay for the operations and maintenance of the Village Center Hub, including sports and recreation

property leased to the Village by the Lee County School District.

- I. Village will be publicly supportive of High 5 obtaining any state or local licensing, permits, and grants required or available for High 5 to conduct business, from local and state organizations, liquor licenses, outdoor serving permits, construction permits, catering permits, state-declared disaster grants, incentive grants, coin-operator permits, or any other licenses, permits, or grants that High 5 is eligible for or required to obtain in order to legally perform business within the Village and the State of Florida.

Article III Term and Commencement Date

- A. This Agreement shall become effective on the Effective Date. The term of the Agreement shall be 90 years from the Effective Date.
- B. Operation of the REF shall commence on or before October 31, 2025. The Village Manager may grant an extension of the commencement date upon finding good cause exists to do so.

Article IV Compensation to Village

- A. Compensation Definitions
 1. **Allowable Expenses** shall mean cost of goods, operating expenses, repair and maintenance expenses, licensing, asset improvements, payroll expenses, marketing and promotional expenses, taxes, insurance and payments to primary mortgage holders or lessors, and any other reasonable and customary costs to own and operate an entertainment center and sports complex.
 2. **Distributable Cash** shall mean cash approved by High 5 to be distributed to entities entitled to distribution of funds (including the Village under the terms of this Agreement) after all Allowable Expenses have been satisfied, and abiding by any covenants prescribed by High 5's lenders and lienholders.
- B. After all Allowable Expenses, as defined in Article IV.A above have been satisfied, the Village will receive a distribution equal to forty percent (40%) of all remaining distributable cash. Distributions are planned to be made on a quarterly basis.

With a collective goal of sustainable operations, the Parties agree to annually evaluate the level of distributions based on the performance of the REF. Any adjustments to distributions based on performance may be mutually agreeable between the Parties.

- C. Notwithstanding the foregoing, pursuant to Art. 7, § 10 of the Florida Constitution, the Village is not, be becoming entitled to the compensation set forth above, becoming a joint owner with, or stockholder of, nor giving, lending or using its taxing power or credit to aid High 5's business.

Article V
Reports and Audit

To validate the revenue share compensation due to the Village, High 5 shall provide a monthly statement of income and a quarterly profit and loss statement covering the operations of the REF in a form acceptable to the Village. At its option, the Village may, at its own expense, retain an independent auditor to audit that portion of the High 5 financial records related to its obligations under this Agreement to operate the pickleball courts and to remit the related portion of distributable cash to the Village as required in Article IV of the Agreement.

Article VI
Estero Resident Benefits; Community Support

- A. Within 60 days of the expected completion of the construction of the REF, High 5 shall coordinate a schedule of Estero Resident Benefits, which should include programs for priority access to the REF (including miniature golf and pickle ball). The Estero Resident Benefits schedule will be negotiated in good faith between High 5 and the Village. Once agreed to, High 5 will work with the Village on the best methods to convey the benefits to Village residents, which may include social media postings. For purposes of this Article, a Village resident is a person who provides a current Florida Driver's License or Florida Identification Card showing residency in Estero, or through an Estero Resident Discount program established and operated by High 5, or such other means as the Village and High 5 agree can be used to verify residency.
- B. High 5 agrees to maximize its support for local charitable and community organizations in its programming offerings for events benefiting those organizations. High 5 further agrees to private management of public programming where requested and where mutually agreed to by the Parties.

Article VII
Maintenance and Future Modification of the REF

- A. High 5 shall ensure it maintains the REF in safe operating order, including maintenance of the REF's façade, structure, security, lighting, electrical and plumbing systems.
- B. High 5 shall provide all equipment to be used at the REF needed to perform under this Agreement. High 5 shall bear the cost of all charges and expenses related to any and all maintenance in the equipment and improvements of the fixtures as shall be necessary for High 5 performance of this Agreement.
- C. During the entire Term of this Agreement, High 5 shall maintain the REF building and related structures in good order and repair with no signs of visual or structural damage. Further, High 5 shall keep the fixtures and equipment in a clean and functioning condition at all times with no signs of visual or structural damage to commercially reasonable levels.

This obligation is subject to commercially reasonable interruption or delay due to weather or other unforeseen circumstances and includes, but is not limited to:

1. Maintenance, cleaning and upkeep of patios, walkways, merchandise shops, offices, storage areas, the restaurant, miniature golf, pickle ball courts, designated storage areas, and assigned parking spaces.
2. Providing clean and well stocked restrooms at all times.
3. Contracting and arranging for the removal of all garbage at all receptacles throughout the REF.
4. Maintaining and replacing, as needed, all internal fixtures, such as ceilings, decorations, furnishings, lighting and floor coverings and any showcases, racks, other display and sales fixtures, including property identification and signage.
5. Maintaining all plumbing, HVAC and electrical repair, maintenance, or upgrades pertaining to the building structure and fixtures of the REF.
6. Maintaining adequate fire protection and inspections and maintenance, as required by law, including kitchen hood systems, sprinkler systems and fire extinguishers in compliance with all applicable fire or building code requirements.
7. Maintaining all food and beverage storage and preparation equipment, including but not limited to stoves, dishwashers, refrigerators, ice machines and sinks in the manner required by all applicable health codes.
8. Performing all interior and exterior maintenance and repair of the REF, including but not limited to replacement of all light elements and fixtures, all doors, door closures, locks, windows, floors and floor coverings, vent fans, exhaust fans, walkways, gates and plant beds.
9. Providing routine monthly pest and rodent control of the REF.
10. Ensuring compliance with Florida law concerning smoking in places of public accommodation.
11. Ensuring all staff act professionally, are clean, well groomed, uniformed and trained to high standards of professionalism and customer service.
12. Maintaining all grease traps including necessary pump down service.
13. Providing annual inspection and preventative maintenance of air conditioning systems, to include the regular replacement of filters in all air conditioning units.
14. Securing annual inspections of the hot water system.

15. Providing security systems maintenance and alarm monitoring.
 16. Providing and keeping current all material safety data sheet (MSDS) information for all hazardous materials, and providing staff hazardous materials training as required by law.
- D. High 5 is authorized to modify the REF so long as any such modifications, including internal or external remodeling, do not alter the footprint or setbacks of the REF. All such modifications must first be presented to the Village Manager for approval. In reviewing such requests, the Village Manager shall ensure any new design or landscaping schemes remain consistent with the aesthetic and design pattern standards of by the Village, while also respecting the High 5 corporate color and design standards.

Article VIII Common Area Maintenance

High 5 shall, by no later than the Effective Date, enter into a Common Area Maintenance (CAM) agreement with the Village, and High 5 shall remain a party to the CAM agreement at all times during the Term of this Agreement. Failure to remain a party to the CAM agreement as required herein shall constitute a material breach of this Agreement.

Article IX Financing of REF Construction

- A. High 5 shall pay for the design and construction of the REF. High 5 will enter into a private-source financing agreement between financing sources and High 5.
- B. Any financing agreement High 5 arranges shall not require the Village to indemnify the financing source, subject the Village's Property to liens, or secure financing of the Village by a mortgage on, or security interest in, the real or tangible personal property of the Village.

Article X Payback; First Right of Refusal; Financial Distress Acquisition; Transfer of REF to Village

- A. In the event that High 5 elects to sell the High 5 entity operating the REF, other than to any corporation or other entity wholly owned or controlled by High 5, or to a successor or successors to the interest of High 5 or its assigns, there shall be a payback to the Village over a five (5) year period starting the first day High 5 or its assigns is open for business ("Payback"). The terms of the Payback to the Village are as follows, where The Capital Contribution is equal to The Capital Contribution value defined in Article II.G of this Agreement:

Until end of Year 1: \$6,000,000 + The Capital Contribution
Until end of Year 2: \$4,800,000 + The Capital Contribution
Until end of Year 3: \$3,600,000 + The Capital Contribution
Until end of Year 4: \$2,400,000 + The Capital Contribution
Until end of Year 5: \$1,200,000 + The Capital Contribution

After Year 5: The Capital Contribution

- B. In the event that High 5 elects to sell the REF other than to any corporation or other entity wholly owned or controlled by High 5, or to a successor or successors to the interest of the High 5, the Village shall have the right of first refusal (RFR) for the purchase of said REF upon the same terms and conditions as are proposed for its sale and purchase by High 5. Said RFR shall be exercised by the Village within forty-five (45) days following written notice to it containing confirmed documentation of an offer for such proposed sale, and a confirmation of High 5's intent to accept such offer, which notice shall be required to be provided to the Village by High 5, following which said right of first refusal shall terminate.
- C. In the event that at any time after the Effective Date of this Agreement a petition in bankruptcy shall be filed by or against High 5 (unless the petition is vacated or dismissed within sixty (60) days of such filing), or High 5 shall be declared by a court of competent jurisdiction to be bankrupt or insolvent, or a receiver or trustee shall be appointed under either state or federal law to take charge of High 5 affairs or property, or High 5 shall make an assignment of the REF for the benefit of creditors, then the Village shall have the right, but not the obligation, to purchase the REF from High 5 at the then book value of the REF. Said right to purchase shall be exercised by the Village within forty-five (45) days following written notice to it that High 5 has become subject to any of the occurrences above-noted, which notice shall be required to be provided to the Village by High 5, following which said right of first refusal shall terminate.

Article XI Insurance

- A. High 5 shall, at its own cost and expense, acquire and maintain (and cause any subcontractors, representatives or agents to acquire and maintain) during the term of this Agreement, sufficient insurance to adequately protect the respective interest of the Parties. Coverage shall be obtained with a carrier having an AM Best Rating of A-VII or better. In addition, the Village retains the right to review High 5's deductible or self-insured retention and to require that it be modified so as to ensure the Village's right to indemnification and ability of High 5 to satisfy judgments or claims is sufficient.
- B. Specifically, High 5 (and any subcontractors, representatives or agents) must carry the following form, types and amounts of insurance until such time of the expiration of this Agreement. The limits may be achieved by a combination of primary and umbrella/excess liability policies.
 - 1. Commercial General Liability Insurance coverage on an occurrence policy form, including but not limited to, premises operations, products/completed operations, products liability, contractual liability, advertising injury, personal injury, death, and property damage in the minimum amount of \$1,000,000 (one million dollars) per occurrence and \$2,000,000 (two million dollars) general aggregate.

2. Commercial Automobile Liability Insurance coverage on an occurrence policy form for any owned, non-owned, hired or borrowed automobile is required in the minimum amount of \$1,000,000 (one million dollars) combined single limit each accident. Coverage must include bodily injury and property damage.
 3. Statutory Workers' Compensation Insurance coverage in accordance with the laws of the State of Florida.
 4. Should High 5 have "leased" employees, High 5 or the Employee Leasing Agency shall provide evidence of Workers' Compensation coverage, which meets the statutory requirements of the State of Florida, for all personnel on the Properties.
 5. Employer's Liability Insurance in the minimum amount of \$100,000 (one hundred thousand dollars) each employee each accident, \$100,000 (one hundred thousand dollars) each employee by disease and \$500,000 (five hundred thousand dollars) aggregate by disease with benefits afforded under the laws of the State of Florida.
 6. If High 5 engages in the business of selling or serving alcohol at the REF, no less than \$1,000,000 (one million dollars) per occurrence and \$2,000,000 (two million dollars) aggregate in Liquor Liability insurance coverage on an occurrence policy form is required.
- C. The Village Manager is authorized to approve adjustments to the foregoing insurance coverage categories and limits to the extent the Manager determines the adjustments are in the Village's best interests and do not unreasonably expose the Village to financial loss.

Article XII
Material Default and Cure

- A. The occurrence of any one or more of the following events or actions will constitute a breach of this Agreement (the "Default" or an "Act of Default") by a Party:
1. cessation of either Party to conduct business,
 2. the filing of a bankruptcy petition, the determination of insolvency by one of the Parties, and/or the appointment of a receiver for administration and disposal of Party's assets,
 3. the misrepresentation of any authority or warranty specified here in,
 4. a failure to perform a material covenant, duty, obligation, or representation made under this Agreement,
 5. the occurrence of any other act or omission which this Agreement defines as a Material Default.

- B. In the event the Village determines that High 5 is in material default of this Agreement, the Village shall provide notice of the default to High 5. High 5 shall thereafter cure the default within ninety (90) days of the notice's having been sent. The Village Manager shall have the authority to extend the cure period if the Manager determines that additional time is necessary, and that High 5 is acting in good faith to cure the default.
- C. If High 5 materially defaults under this Agreement, the compensation that is otherwise due to be retained by High 5 is payable to satisfy all financial obligations to investors and lenders on the REF (if any) until such obligations are satisfied, and then shall be used to fund the costs of operating and maintaining the REF. Additionally, if High 5 materially defaults and fails to cure within the cure period, the Village may terminate this Agreement with cause and without prejudice, and may exercise any other rights or remedies that may be available to it in accordance with the provisions of this Agreement. The full faith and credit of the Village may not be pledged to secure the financing of the private entity. The assumption of the development or operation of the project does not obligate the Village to pay any obligation of the High 5 from sources other than revenues from the REF unless stated otherwise in this Agreement.

Article XIII Termination

This Agreement shall terminate at the expiration of the Term, or as otherwise provided for in this Agreement.

Article XIV Notices

Any and all notices sent pursuant to this Agreement shall be given in writing via certified mail or overnight courier and shall be delivered to the following addresses:

As to High 5:

High Five Up Top, LLC
Attn: Scott Emley, CEO
507 N Bradley St
McKinney, TX 75069

As to Village:

The Village of Estero
Attn: Village Manager
9401 Corkscrew Palms Circle
Estero, FL 33928

Article XV Preservation of Sovereign Immunity

Entering into this Agreement does not waive the sovereign immunity of the Village, or an officer or employee thereof, with respect to participation in, or approval of, any part of the REF or its operation, including, but not limited to, interconnection of the REF with any other infrastructure or project. The Village possesses sovereign immunity with respect to the REF, including, but not limited to, its design, construction, and operation.

Article XVI
General Terms

- A. *Compliance with Laws.* The REF must comply with the requirements of federal, state, and local laws; state, regional, and local comprehensive plans; the Village's rules, procedures, and standards for facilities.
- B. *No Joint Venture.* The name of this Agreement notwithstanding, nothing herein shall constitute or be interpreted as establishing a joint venture, ownership, and/or other agency relationship by and between the Village and High 5. No Party shall hold itself out contrary to the terms of this Article, and no Party shall become liable by any representation, act, or omission of the contrary to this Article.
- C. *Force Majeure.* Unless otherwise provided in this Agreement, if performance under this Agreement is prevented, restricted or interfered with by reason of any event beyond the reasonable control of the Parties, including but not limited to, fire, flood, epidemic, earthquake, explosion, act of God or public enemy, riot or civil disturbance, strike, labor dispute, war, terrorist threat or activity, any government law, order, or regulation, or order of any court or jurisdiction (a "Force Majeure"), the restricted Party will not be in breach hereof and the performance or obligation of such Party will be excused for a period of time equal to the period during which the Force Majeure prevents such performance. In such event, the Parties will make reasonable efforts to determine sufficient "make goods" allowing the restricted Party to satisfy its obligations hereunder. The financial condition, default, breach, or intentional or negligent act or omission of this Agreement by the Party seeking excuse from performance will not constitute a Force Majeure.
- D. *Amendments.* This Agreement may only be amended by a written Amendment executed by both Parties.
- E. *Severability.* In the event that any provision or portion of this Agreement shall be found to be invalid or unenforceable, then such provision or portion may be severed and such invalidity or unenforceability shall not affect the validity or enforceability of any other provision or portion of the Agreement.
- F. *Qualifications.* High 5 represent and warrant to the Village that each are lawfully entitled to engage in the business operations authorized herein under the laws of the State of Florida, and will continue to meet throughout the Term of this Agreement all of the qualifications required by the Village, including holding and maintaining all required business licenses in good standing. High 5 must immediately inform the Village Manager in the event it has any required license suspended or revoked related to its operations of the REF.
- G. *Attorney Fees.* In any action brought between the Parties to enforce or construe the terms of this Agreement, each Party shall bear its own attorneys' fees and costs, including any fees incurred on appeal, regardless of the resolution of the case or appeal(s).

- H. *Immigration Compliance; E-Verify.* High 5 acknowledge that they are responsible for complying with the provisions of the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a, et seq., and regulations relating thereto. Failure to comply with the above statutory provisions shall be considered a material breach and shall be grounds for immediate termination of this Agreement. High 5's employment of unauthorized aliens is a violation of § 274A(e) of the Federal Immigration and Employment Act. The High 5 shall utilize the U.S. Department of Homeland Security's E-Verify system to verify the employment eligibility of all new employees hired during the term of this Agreement and shall require the same verification procedure of any Subcontractors authorized by the Owner. Pursuant to Florida Statutes § 448.095(5), High 5 (unless High 5 employ no one else) shall register with and use the E-Verify system to verify the work authorization status of all newly hired employees. High 5's contract with the Village cannot be renewed unless, at the time of renewal, High 5 certifies in writing to the Village that they have registered with and uses the E-Verify system (or that it is not an employer). If High 5 enters into a contract with a subcontractor, the subcontractor must provide the High 5 with an affidavit stating that the subcontractor does not employ, contract with, or subcontract with an unauthorized alien and High 5 shall maintain a copy of such affidavit for the duration of the contract. If High 5 develops a good faith belief that any subcontractor with which it is contracting has knowingly violated Florida Statutes § 448.09(1) (making it unlawful for any person knowingly to employ, hire, recruit, or refer, either for herself or himself or on behalf of another, for private or public employment within the state, an alien who is not duly authorized to work by the immigration laws or the Attorney General of the United States) High 5 shall terminate the contract with the subcontractor. If the Village develops a good faith belief that High 5 has knowingly violated Florida Statutes § 448.09(1) (making it unlawful for any person knowingly to employ, hire, recruit, or refer, either for herself or himself or on behalf of another, for private or public employment within the state, an alien who is not duly authorized to work by the immigration laws or the Attorney General of the United States) the Village shall terminate this Agreement. Pursuant to Florida Statutes § 448.095(5)(c)(3), termination under the above circumstances is not a breach of contract and may not be considered as such.
- I. *Indemnification, Preservation of Immunity.* Each Party hereby agrees to fully indemnify and hold harmless the other, its officers, employees, and agents from and against any and all claims, losses, costs, expenses, actions and causes of action, including reasonable attorney's fees at all levels, arising out or by reason of any damage or injury to persons or property suffered or claimed to have been suffered, by any intentional, reckless or negligent act or omission of the indemnifying party, its directors, officers, employees, or agents in the carrying out of the terms and conditions of this Agreement. The Party claiming right to indemnification ("Claimant") will give the indemnifying Party ("Indemnitor") prompt notice of any such claim and the Indemnitor will undertake the defense thereof by representatives of its own choosing. In the event Indemnitor, within a reasonable time after notice of claim, fails to defend, the Claimant shall have the right to undertake the defense, compromise or settlement of such claim on behalf of and for the account and risk of the Indemnitor, subject to the right of the Indemnitor to assume such defense at any time prior to settlement, compromise or final determination thereof. Notwithstanding the foregoing, in the event either Party reasonably believes that counsel defending any such action has

unacceptable conflicts of interest or otherwise lacks the skill to adequately protect such Party's interest, such Party reserves the right to defend itself with its own counsel or retained counsel at the Indemnitor's expense, unless the Claimant is found negligent or otherwise responsible for the occasion of the litigation. Nothing herein shall be interpreted as a waiver by the Village of its rights, including the procedural requirements and limited waiver of sovereign immunity, as set forth in Florida Statutes § 768.28, or any other statute, and the Village expressly reserves these rights to the full extent allowed by law.

- J. *No Third-Party Beneficiary.* This Agreement is for the benefit of the Parties and their respective successors and permitted assigns, and it is not the intent of the Parties to enter this Agreement for any other person's or entity's benefit, and no person or entity not a Party to this Agreement is intended to have standing to file any court action seeking the enforcement or interpretation thereof.
- K. *Jurisdiction, Venue, Applicable Law.* In the event of any litigation between the Parties with respect to the interpretation or enforcement of this Agreement, same shall be conducted, if in state court, in the appropriate circuit or county court in and for Lee County, Florida, and if in federal court, in the United States District Court for the Middle District of Florida, Ft. Myers Division. In any such litigation, the substantive and procedural laws of the State of Florida shall be applied.
- L. *Public Records.* In accordance with Florida Statutes § 119.0701, High 5 shall:
1. Keep and maintain public records required by the Village to perform the service.
 2. Upon request from the Village's custodian of public records, provide the requesting Village with a copy of the requested records or allow the records to be inspected or copied within a reasonable time at a cost that does not exceed the cost provided in this chapter or as otherwise provided by law.
 3. Ensure that public records that are exempt or confidential and exempt from public records disclosure requirements are not disclosed except as authorized by law for the duration of the contract term and following completion of the contract if High 5 does not transfer the records to the Village.
 4. Upon completion of the contract, transfer, at no cost, to the Village all public records in possession of High 5 or keep and maintain public records required by the Village to perform the service. If High 5 transfers all public records to the Village upon completion of the contract, High 5 shall destroy any duplicate public records that are exempt or confidential and exempt from public records disclosure requirements. If High 5 keeps and maintains public records upon completion of the contract, High 5 shall meet all applicable requirements for retaining public records. All records stored electronically must be provided to the Village, upon request from the Village's custodian of public records, in a format that is compatible with the information technology systems of the Village.

IF HIGH 5 HAS QUESTIONS REGARDING THE APPLICATION OF CHAPTER 119, FLORIDA STATUTES, TO HIGH 5'S DUTY TO PROVIDE PUBLIC RECORDS RELATING TO THIS CONTRACT, CONTACT THE CUSTODIAN OF PUBLIC RECORDS AT THE VILLAGE OF ESTERO, VILLAGE CLERK'S OFFICE, AT:

TELEPHONE: 239.221.5035

EMAIL: Csacco@estero-fl.gov

ADDRESS: 9401 Corkscrew Palms Circle, 2nd Floor, Estero, FL 33928

- M. *Assignment and Subcontracting.* The Village has selected High 5 for its stated skills, resources, abilities, business model, market identification and unique experience, as represented to the Village by High 5 solicitation response and via other means. High 5 has represented to the Village that it has the in-house capabilities, resources and expertise to perform the services required by this Agreement except as otherwise expressly set forth in this Agreement. Therefore, except in the case of a sale, transfer or assignment of all or substantially all of the assets of to a successor who has asserted its intent to continue the business of High 5 (including transfer to a subsidiary or franchisee of High 5), High 5 shall not assign or transfer any right or duty under this Agreement to any other party without the prior written consent of the Village. In the unlikely event High 5 asserts it is necessary to subcontract for the services of third parties to perform the services required under this Agreement not already provided for therein, High 5 shall first obtain prior written approval of the Village Manager. Approval to utilize any third party shall not relieve High 5 from any direct liability or responsibility to the Village pursuant to the provisions of this Agreement, or obligate Village to make any payments other than payments due to High 5 as outlined in this Agreement. While requests to subcontract are strongly discouraged and unlikely to be granted, in the event the Village grants such permission, High 5 is obligated to ensure any such subcontractor's contract expressly incorporates the terms and conditions of this Agreement and acknowledges the Village as an intended third-party beneficiary thereof.
- N. *Merger.* This Agreement constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes all prior agreements, understandings and arrangements, both oral and written, between the Parties with respect thereto.

[Signature Page Follows]

IN WITNESS WHEREOF, the Parties have caused this Public Improvement Agreement to be executed and delivered to each other.

Village of Estero, Florida

High Five Up Top, LLC

by: Steve Sarkozy, Village Manager

by: Scott Emley, CEO

Exhibit “A”

Exhibit “B”