

**FIRST AMENDMENT TO THE FUNDING AGREEMENT  
LEVITT PAVILION AT RUBY HILL**

**THIS FIRST AMENDMENT TO THE FUNDING AGREEMENT** (the “Amendment”), made and entered into by and among the **CITY AND COUNTY OF DENVER**, a municipal corporation of the State of Colorado (the “City”), **FRIENDS OF LEVITT PAVILION DENVER**, a Colorado nonprofit corporation (“**Levitt Denver**”), **MORTIMER & MIMI LEVITT FOUNDATION**, a New York not-for-profit corporation (the “**Foundation**”) and **LEVITT PAVILIONS**, a California nonprofit corporation (“**Levitt National**”). Levitt Denver, the Foundation, and Levitt National may sometimes be referred to herein collectively as the “**Levitt Parties**”. The City, Levitt Denver, the Foundation, and Levitt National may sometimes be referred to herein individually as a “**Party**” or collectively as the “**Parties**”.

**RECITALS**

**WHEREAS**, the City entered into a Funding Agreement (the “Agreement”) dated November 25, 2013 with the Levitt Parties in order to make available Bond Proceeds (all defined terms not herein defined have the same meaning as in the Agreement) for the Project and to receive the Matching Funds from Levitt Denver for the construction by the City of the Project; and

**WHEREAS**, Levitt Denver has provided the City with a partial payment of the Matching Funds in the amount of \$490,000.00 and the City expects to receive an additional \$710,000.00 in Matching Funds (the “Received Matching Funds”) from Levitt Denver by June 15, 2016, but in no case later than September 30, 2016; and

**WHEREAS**, the City and Levitt Denver desire to modify the conditions upon which the remaining Matching Funds will be transferred by Levitt Denver to and used by the City for the purposes of completing the Project.

**NOW, THEREFORE**, in consideration of the above, and the mutual promises and covenants contained herein, the City and the Levitt Parties agree as follows:

1. Section 3, “Matching Funds Payment and Related Responsibilities,” is modified

by amending subsection C to acknowledge that the City is beginning design and will proceed with construction of the Project without receipt of the entire amount of Matching Funds and to acknowledge that the City may, in its sole discretion, provide additional funds beyond \$2,000,000.00 in support of construction of the Project. In addition, the remaining amount of Matching Funds not received by the City after the receipt of the Received Matching Funds, anticipated to be \$800,000.00 (the "Remaining Matching Funds") shall be paid to the City by Levitt Denver in accordance with the schedule for payment of the Remaining Matching Funds attached hereto as Exhibit A, "Contribution of Remaining Matching Funds," and incorporated herein.

2. Section 4, "Planning, Design and Construction of the Project," is modified by increasing the amount that the Plan may be projected to cost to be in excess of \$4,000,000.00 as agreed upon by the Parties. The Parties acknowledge that the Project will not be completed in 2016. Rather, the Parties acknowledge that the current schedule anticipates completed construction of the Project and Ruby Hill Park transportation and access improvements by mid-summer 2017, assuming receipt of the Received Matching Funds no later than June 15, 2016. The City will not undertake construction of the Project unless and until the Received Matching Funds are fully received by the City.

3. As a condition to the City agreeing to receive the Remaining Matching Funds over time as set out in Exhibit A, Levitt Denver agrees:

a. To provide the Received Matching Funds to the City no later than September 30, 2016.

b. To pay interest on the outstanding Remaining Matching Funds at a rate of 2.8% p.a. accruing annually beginning January 1, 2018, payable annually thereafter.

c. To report to the City's Chief Financial Officer ("CFO") its income statement, balance sheet, cash flow statement (if available), and accounts receivable pledge sheet on a quarterly basis beginning March, 2016, with a copy of such report provided to the Foundation.

d. To report to the CFO (1) an updated 5-year pro forma in format similar to that which has in the past been provided to the City and (2) Financial Covenants, defined below, calculations on an annual basis beginning January 1, 2017.

e. To timely notify the CFO of any management or Levitt Denver board of

directors changes.

f. To notify the CFO of any prepayment of the Remaining Matching Funds, which is to be applied at the discretion of Levitt Denver.

g. To prepay the Remaining Matching Funds in advance of the schedule set out in Exhibit A if Net Revenue in any fiscal year exceeds the required total Remaining Matching Funds payment in the same year. Any mandatory prepayment of the Remaining Matching Funds will be applied at the discretion of Levitt Denver. This requirement may be waived at the sole discretion of the CFO and the City's executive director of the Department of Parks and Recreation (the "Executive Director of Parks"). "Net Revenue" is Total Revenue from fundraising, sales of concessions, and any other source minus Total Expenditures related solely to the programming costs for 50 free concerts, emergency reserves, payroll liabilities, and reasonable costs of operations, as identified in Levitt Denver's "Statement of Activity" report.

h. To not pledge any of its assets to any lender or other entity for any reason without prior written consent of the CFO.

i. To not create any indebtedness of Levitt Denver without the prior written consent of the CFO. The CFO's consent shall require any permitted indebtedness be ranked pari passu with Levitt Denver's obligation to pay to the City the Remaining Matching Funds.

4. Representations and Warranties: Levitt Denver continuously warrants, covenants and agrees as follows:

a. Levitt Denver is validly existing and in good standing under the laws of the State of Colorado.

b. Levitt Denver has the requisite power and authority to execute, deliver, and perform its obligations under the Agreement and this Amendment.

c. Levitt Denver acknowledges that the Agreement and this Amendment are legal, valid and binding obligations of Levitt Denver, enforceable against Levitt Denver.

d. All financial information submitted by Levitt Denver to the City has been and will be complete and accurate, including the financial information submitted to the City pursuant to the reporting requirements herein.

e. As of the date of this Amendment, Levitt Denver has no outstanding debt.

5. Default.

a. In the event that Levitt Denver fails to pay to the City the Received Matching Funds by September 30, 2016, Levitt Denver will be in default of this Amendment and the Agreement.

b. In the event that Levitt Denver fails to pay to the City the Remaining Matching Funds pursuant to the schedule in Exhibit A, Levitt Denver will be in default of this Amendment and the Agreement if such non-payment is not cured within thirty (30) days of the date on which such payment is due in Exhibit A. Written notice for such non-payment pursuant to the schedule in Exhibit A shall be provided by the City to Levitt Denver and to the Foundation within five (5) business days. Written notice of default for such non-payment within the thirty (30)-day cure period shall be provided by the City to Levitt Denver and to the Foundation within five (5) business days following the thirty (30)-day cure period.

6. Remedies. In the event of a default, the City, in its sole discretion, may choose to
- a. terminate the Agreement and/or the Operations Agreement;
  - b. request the resignations of the Levitt Denver executive director and/or board of directors;
  - c. negotiate in good faith to effect a solution which maximizes public benefit and ensures that investments made prior to such default are not forfeited.

7. Except as otherwise modified in this Amendment, the Agreement is affirmed and ratified in each and every particular.


8. Electronic Signatures and Electronic Records: The Levitt Parties consent to the use of electronic signatures by the City. The Agreement, and any other documents requiring a signature hereunder, may be signed electronically by the City in the manner specified by the City. The Parties agree not to deny the legal effect or enforceability of the Agreement solely because it is in electronic form or because an electronic record was used in its formation. The Parties agree not to object to the admissibility of the Agreement in the form of an electronic record, or a paper copy of an electronic document, or a paper copy of a document bearing an electronic signature, on the ground that it is an electronic record or electronic signature or that it is not in its original form or is not an original.

EXHIBIT A  
**Contribution of Remaining Matching Funds**


12/31/2016	\$0
12/31/2017	\$0
12/31/2018	\$ 50,000
12/31/2019	\$ 65,000
12/31/2020	\$ 75,000
12/31/2021	\$100,000
12/31/2022	\$125,000
12/31/2023	\$125,000
12/31/2024	\$125,000
12/31/2025	\$135,000

Contract control number: PARKS- 201313796-01

MORTIMER & MIMI LEVITT FOUNDATION

By:   
Elizabeth Levitt Hirsch  
President

LEVITT PAVILIONS

By:   
Sharon Yazowski  
Executive Director

FRIENDS OF LEVITT PAVILION DENVER

By: \_\_\_\_\_  
Chris Zacher  
Executive Director

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