

**RESOLUTION NO. 5312**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF SOLEDAD APPROVING AND AUTHORIZING THE CITY MANAGER TO EXECUTE A “DIRECT AGREEMENT” BETWEEN THE CITY, FOUNDATION WINDPOWER, LLC, FOUNDATION HA ENERGY GENERATION, LLC, FOUNDATION CA FUND VII MASTER TENANT, LLC, AND FOUNDATION CA FUND VII OWNER, LLC, FOR THE BENEFIT OF ZB, N.A. dba NATIONAL BANK OF ARIZONA**

**WHEREAS**, on April 2, 2014, the Soledad City Council adopted Resolutions 4964 and 4965, approving a “First Amended and Restated Wind Site Lease and Easement Agreement” and “First Amended and Restated Wind Power Purchase Agreement” with Foundation Windpower, LLC (“Foundation”); and

**WHEREAS**, by the terms of the Agreements, Foundation installed a wind turbine on leased City property at the Water Reclamation Facility (“WRF”), and commenced selling electricity generated by said turbine at a discounted rate back to the City for use for WRF operations; and

**WHEREAS**, Section 12.2 of the Lease Agreement commits the City to execute what is commonly known as a “Direct Agreement,” a financing document that allows a Windpower Project related lender to protect its investment in the Project by enabling the same to step into the shoes of Foundation in the event of any default under the terms of the Lease; and

**WHEREAS**, on June 4, 2014, the City Council approved and authorized the City Manager to enter into a Direct Agreement with the construction lender for the Project via adoption of Resolution No. 4981- A Resolution of the City Council of the City of Soledad Approving and Authorizing the City Manager to Execute a Direct Agreement between the City, Foundation Windpower, LLC, Foundation CA Fund VII Master Tenant, LLC, and Foundation CA Fund VII Owner, LLC, for the Benefit of Seminole Financial Services LLC D/B/A/ SFS-Cal, LLC”; and

**WHEREAS**, in 2015, when the construction loan with Seminole Financial Services was paid by Foundation, a new Direct Agreement with the Project’s permanent lender, HAT CFII OP A, LLC, was approved by City the Council on May 6, 2015 by Resolution No. 5079; and

**WHEREAS**, Foundation has decided to refinance its corporate debt, and has requested that the City approve and execute a new Direct Agreement for the benefit of Lender ZB, N.A. dba NATIONAL BANK OF ARIZONA, Staff has reviewed the new Direct Agreement and is recommending that the City Council approve the Agreement in order to facilitate Foundation’s refinancing obligations; and

**WHEREAS**, once approved and executed, the new Direct Agreement will supersede all previous similar agreements concerning this matter.

**NOW THEREFORE, BE IT HEREBY RESOLVED** by the City Council of the City of Soledad that the Direct Agreement between the City, Foundation Windpower, LLC, Foundation HA Energy Generation, LLC, Foundation CA Fund VII Master Tenant, LLC, and Foundation CA Fund VII Owner, LLC, for the Benefit of ZB, N.B. dba National Bank of Arizona, a copy of which is attached hereto as **Exhibit A** and by this reference incorporated herein, is hereby approved and the City Manager is authorized and directed to execute the same on behalf of the City.


**PASSED AND ADOPTED** by the City Council of the City of Soledad at a regular meeting duly held on the 5<sup>th</sup> day of July, 2017, by the following vote:

**AYES**, and in favor thereof, Councilmembers: Mayor Pro Tem Alejandro Chavez, Mayor Fred Ledesma, Carla Stewart and Anna Velazquez

NOES, Councilmembers: None

ABSENT, Councilmembers: Bourke

ABSTAIN, Councilmembers: None

  
\_\_\_\_\_  
FRED J. LEDESMA, Mayor

ATTEST:



\_\_\_\_\_  
MICHAEL McHATTEN, City Clerk

**DIRECT AGREEMENT**

This **DIRECT AGREEMENT**, dated as of June \_\_, 2017 (this "Direct Agreement") is entered into by the **CITY OF SOLEDAD**, a public body, corporate and politic ("Contracting Party"), **FOUNDATION WINDPOWER, LLC**, a California limited liability company ("FWP"), **FOUNDATION HA ENERGY GENERATION, LLC**, a California limited liability company ("Borrower"), **FOUNDATION CA FUND VII MASTER TENANT, LLC**, a California limited liability company ("Master Tenant") and **FOUNDATION CA FUND VII OWNER, LLC**, a California limited liability company ("Owner" and, together with Borrower and Master Tenant, "Project Owner"), for the benefit of **ZB, N.A. dba NATIONAL BANK OF ARIZONA** ("Lender").

**RECITALS**

WHEREAS, in connection with a wind-powered electric generating facility located in the City of Soledad, California (the "Project") Contracting Party and FWP are party to (a) that certain First Amended and Restated Wind Power Purchase Agreement, dated as of dated as of April 2, 2014, (as amended, the "PPA"), and (b) that certain First Amended and Restated Wind Site Lease and Easement, dated April 2, 2014 (the "Lease Agreement"), whereby, *inter alia*, Contracting Party has leased to FWP the leased premises ("Leased Premises") more fully described in the Lease Agreement (defined below) and incorporated herein by this reference, which was evidenced by a Memorandum of Lease dated June 4, 2014 and recorded in the official records of Monterey County, on June 11, 2014 as Document Number 2014026929 ("Memorandum of Lease") (the Lease Agreement and the Memorandum of Lease are hereinafter collectively referred to as the "Leasehold Documents"). The PPA and the Leasehold Documents are referred to herein collectively as the "Assigned Agreements";

WHEREAS, Project Owner and Lender entered into that certain Master Loan Agreement, dated as of June \_\_, 2017 (as amended, the "Loan Agreement"), pursuant to which the Lender will make loans and other extensions of credit to Project Owner;

WHEREAS, Owner leased the Project to Master Tenant pursuant to a Master Lease dated as of June 12, 2014. Project Owner will receive substantial direct or indirect benefits from the transactions contemplated by the Loan Agreement; and

WHEREAS, Project Owner has entered into that certain Leasehold Deed of Trust, Assignment of Rents and Leases, Security Agreement and Fixture Filing and a Security Agreement (collectively, the "Security Agreement") with the Lender, pursuant to which Project Owner has assigned all of its right, title and interest in, to and under, and granted a first priority security interest in, the Assigned Agreements.

**AGREEMENT**

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and adequacy of which are hereby acknowledged, and intending to be legally bound, the parties hereto hereby agree, notwithstanding anything to the contrary in the Assigned Agreements, as follows:

**ARTICLE 1.  
CONSENT TO ASSIGNMENT, ETC.**

1.1 CONSENT TO ASSIGNMENT. Contracting Party (a) acknowledges that the Lender is entering into the Loan Agreement and related financing documents and making a loan to Project Owner in reliance upon the execution and delivery by Contracting Party of this Direct Agreement, (b) consents to the collateral assignment under the Security Agreement of all of Project Owner's right, title and interest in, to and under the Assigned Agreements, including all of Project Owner's rights to receive payment under or with respect to the PPA and all payments due and to become due to Project Owner under or with respect to the Assigned Agreements, whether as contractual obligations, damages, indemnity payments or otherwise (collectively, the "Assigned Interests"), (c) acknowledges the right of the Lender or its designee or assignee, in the exercise of the Lender's rights and remedies under the Security Agreement, to make all demands, give all notices, take all actions and exercise all rights of Project Owner under the Assigned Agreements and (d) acknowledges and agrees that notwithstanding anything to the contrary contained in the Assigned Agreements, the Lender shall have the rights and benefits of a "Project Financing Party" and "Mortgagee" each as defined in the Assigned Agreements, provided that, subject to the provisions of this Direct Agreement, all such rights and benefits shall be subject to each and all of the covenants, conditions and restrictions set forth in the Assigned Agreements. Project Owner acknowledges and agrees that Project Owner may not in any manner encumber Contracting Party's interest in or under the Assigned Agreements or Contracting Party's fee simple interest in the Leased Premises or Contracting Party's personal and other property in, on or around the Leased Premises.

1.2 SUBSEQUENT OWNER.

1.2.1 Contracting Party, Lender and Project Owner agree that if the Lender notifies Contracting Party that an Event of Default has occurred and is continuing and that the Lender has elected to exercise the rights and remedies set forth in the Security Agreement, then (a) the Lender or a Permitted Transferee (Lender or such Permitted Transferee, the "Subsequent Owner") shall be substituted for Project Owner under the Assigned Agreements, (b) Contracting Party will recognize the Subsequent Owner as its counterparty under the Assigned Agreements and will continue to perform its obligations under the Assigned Agreements in favor of the Subsequent Owner (including its obligations under any warranties) provided that such Subsequent Owner has assumed in writing all of Project Owner's rights and obligations (including, without limitation, the obligation to cure any then existing payment and performance defaults, but excluding any then existing performance defaults which by their nature are incapable of being cured) under the Assigned Agreements; and (c) Contracting Party shall be relieved of any obligation to make payment to Project Owner or otherwise perform obligations for Project Owner under the Assigned Agreements so long as such payment or performance is made for Subsequent Owner. For purposes of this Direct Agreement, "Permitted Transferee" means Lender's designee or assignee or any other single purchaser or single transferee of all of the Assigned Interests in a judicial or nonjudicial foreclosure sale or by a conveyance made in lieu of foreclosure, which designee, assignee, purchaser, or transferee (i) has elected in writing to assume all of Project Owner's or Lender's (as applicable) rights and obligations under all of the Assigned Agreements and (ii) is (either directly or indirectly through a third party operator or contractor with like kind successful experience) capable of assuming and performing all of

## AGREEMENT VOID

Project Owner's or Lender's (as applicable) obligations under all of the Assigned Agreements. Project Owner agrees to indemnify, protect, defend and hold harmless Contracting Party from and against any liabilities, claims, damages (including injury or damage to person or property), losses, costs, expenses and fees (including reasonable attorneys' and experts' fees and costs) relating to payments made to or obligations performed for Subsequent Owner rather than Project Owner by Contracting Party under the Assigned Agreements.

1.2.2 Contracting Party acknowledges and agrees that, notwithstanding anything to the contrary in the Assigned Agreements, none of (a) the assignment of the Assigned Agreements pursuant to the Security Agreement, (b) the foreclosure or any other enforcement action (any such action an "Enforcement Action") undertaken by the Lender in respect of its rights under the Security Agreement or any other related pledge agreement or mortgage, (c) the acquisition of the rights of Project Owner under the Assigned Agreements as a consequence of any Enforcement Action by the Lender or any Permitted Transferee (or acceptance of an absolute assignment of the Assigned Agreements in lieu of an Enforcement Action) or (d) the assignment of the Assigned Agreements by the Lender to a Permitted Transferee following a purchase after an Enforcement Action or following an absolute assignment thereof in lieu of an Enforcement Action, shall constitute a default by Project Owner under the Assigned Agreements or shall result in termination thereof.

1.2.3 Notwithstanding anything to the contrary herein, the recourse of Contracting Party in seeking the enforcement of any obligations under this Direct Agreement, the Assigned Agreements or under any replacement agreement shall be limited to the same assets of Project Owner as would be available to Contracting Party in a claim against Project Owner as of the date of this Direct Agreement. The liability of Subsequent Owner or its successor(s), permitted assignee(s), or designee(s) to Contracting Party under this Direct Agreement, any Assigned Agreement or any replacement agreement shall not extend beyond such assets. Upon any sale or transfer of its interest in the Project by Subsequent Owner and assumption of liability as of the date of acquisition by the purchaser thereof, Subsequent Owner shall have no further liability under the Assigned Agreements or this Direct Agreement after the effective date to the extent such liabilities have effectively been assumed by such purchaser.

1.3 RIGHT TO CURE. In the event of a default by Project Owner in the performance of any of its obligations under an Assigned Agreements, or upon the occurrence or non-occurrence of any event or condition under an Assigned Agreement which would immediately or with the passage of any applicable grace period or the giving of notice, or both, enable Contracting Party to terminate or suspend its performance under an Assigned Agreement (each hereinafter a "Default"), notwithstanding any notice period provided in such Assigned Agreement, Contracting Party shall not terminate or suspend its performance under such Assigned Agreement until it first gives prompt written notice of such Default to the Lender or its designee or assignee and affords each such party a period of thirty (30) days, provided that it promptly commences in good faith to cure the Default within such cure period, and it diligently and continuously pursues such cure, (or if such Default is a non-monetary Default, such longer period as is required to cure such non-monetary Default so long as any such party has commenced and is diligently pursuing appropriate action to cure such Default, but in no event longer than sixty (60) days) from receipt of such notice to cure such Default; provided, however, that (a) if possession of the Project is necessary to cure such Default and the Lender or its

## AGREEMENT VOID

designee or assignee has commenced foreclosure proceedings, the Lender or its designee or assignee will be allowed a reasonable time to complete such proceedings, provided Lender or its designee or assignee is diligently pursuing possession of the Project, and (b) if the Lender or its designee or assignee is prohibited from curing any such non-monetary Default by any process, stay or injunction issued by any governmental authority or pursuant to any bankruptcy or insolvency proceeding or other similar proceeding involving Project Owner, then the time periods specified herein for curing a Default shall be extended for the period of such prohibition, provided that Lender or its designee or assignee is diligently pursuing the lifting of such process, stay or injunction.

1.4 REPLACEMENT AGREEMENT. In the event that an Assigned Agreement is terminated as a result of any bankruptcy, insolvency, reorganization or similar proceeding affecting Project Owner, and if, within sixty (60) days after such cancellation or termination, the Lender so requests, Contracting Party will enter into a new agreement with the Lender or its Permitted Transferee (i) having the same terms and conditions as the terms of such Assigned Agreement, provided that any differing terms and conditions shall be subject to approval by Contracting Party's governing body in its sole and absolute discretion, and (ii) producing the same economic effect and the same level of performance to Contracting Party as continuing such Assigned Agreement.

1.5 NO LIABILITY. Contracting Party acknowledges and agrees that neither the Lender nor its Permitted Transferee shall have any liability or obligation under the Assigned Agreements as a result of this Direct Agreement, the Security Agreement or otherwise, nor shall the Lender or its Permitted Transferee be obligated or required to perform any of Project Owner's obligations under the Assigned Agreements, except during any period in which the Lender (or its Permitted Transferee) is a Subsequent Owner pursuant to Section 1.2, in which case (i) the obligations of such Subsequent Owner shall be no more than that of Project Owner under the Assigned Agreements and (ii) such Subsequent Owner shall not be required to perform or be subject to any defenses or offsets by reason of any of Project Owner's obligations under the Assigned Agreements that were unperformed at the time such Subsequent Owner became a Subsequent Owner (other than any defaults for failure to pay amounts owed under the Assigned Agreements or to the extent that a non-monetary default has not been cured and is capable of cure).

1.6 TRANSFER. Provided Lender or its Permitted Transferee, as applicable, is not in default under the Assigned Agreements, the Lender shall have the right to assign the Assigned Agreements or a new agreement entered into pursuant to Section 1.4 to a person or entity to whom the Project is transferred, provided that such transferee is a Permitted Transferee. Upon such assignment, the Lender shall be released from any further liability under the Assigned Agreements or such new agreement to the extent of the interest assigned.

1.7 DELIVERY OF NOTICES AND NO AMENDMENT. Contracting Party shall deliver to the Lender or, if notice from Lender is received designating a Permitted Transferee, then to Lender's Permitted Transferee, concurrently with the delivery thereof to Project Owner, a copy of each notice regarding defaults, suspensions, terminations, actual or threatened litigation or arbitration between Contracting Party and Project Owner, or material amendments given by Contracting Party to the Project Owner pursuant to the Assigned Agreements. Any notice

## AGREEMENT VOID

required or permitted to be given in writing under this Agreement shall be given or delivered by personal service, Federal Express or comparable overnight delivery service, or by deposit in the United States Post Office, postage prepaid, by registered or certified mail, addressed to the party receiving notice as specified below, which shall be updated by the parties as required. Changes in such address and/or contact persons named shall be made by notice similarly given. Notices given by personal service shall be deemed given the day so given. Notices mailed or sent by a delivery service or by registered or certified mail as provided herein shall be deemed given on the third business day following the date so mailed or on the date of actual receipt, whichever is earlier. All notices or tender required or permitted herein shall be in writing and shall be sent to the address set forth below (or such other address as a party may hereafter designate for itself by written notice to the other parties as required hereby) of the party for whom such notice or communication is intended:

If to Lender:

ZB, N.A. dba National Bank of Arizona  
6001 N. 24<sup>th</sup> Street  
Phoenix, AZ 85016  
Attn: Jonathan Bouvet  
(Tel) (602) 242-6440  
(Fax) (602) 351-3825  
(email) Jonathan.Bouvet@nbarizona.com

If to Contracting Party:

City of Soledad  
248 Main Street  
Soledad, CA 93960  
Phone: (831) 223-5000  
Attn: City Manager and City Attorney

To the extent permitted by applicable law, Contracting Party agrees that it shall not, without the prior written consent of the Lender (which consent shall not be unreasonably withheld, delayed or conditioned): (a) enter into any material supplement, restatement, extension, amendment or modification of the Assigned Agreements, (b) enter into any novation of the Assigned Agreements with any natural person, corporation, trust, business trust, joint venture, joint stock company, association, company, limited liability company, partnership, Governmental Entity or other entity, (c) terminate or suspend its performance under the Assigned Agreements (except in accordance with Section 1.3) or (d) consent to or accept any termination or cancellation of the Assigned Agreements by Project Owner.

1.8 Entry on Leased Premises. Contracting Party agrees that upon and after any of (a) the assignment of the Leasehold Documents pursuant to the Security Agreement, (b) an Enforcement Action undertaken by the Lender in respect of its rights under the Security Agreement or any other related pledge agreement or mortgage, (c) the acquisition of the rights of

Tenant under the Leasehold Documents as a consequence of any Enforcement Action by the Lender or any Permitted Transferee (or acceptance of an absolute assignment of the Leasehold Documents in lieu of an Enforcement Action) or (d) the assignment of the Leasehold Documents by the Lender to a Permitted Transferee following a purchase after an Enforcement Action or following an absolute assignment thereof in lieu of an Enforcement Action, Lender shall have the right to enter, possess and use the Leased Premises at such reasonable times and manner as are necessary or desirable to effectuate the remedies and enforce the rights of Lender under the Loan Agreement, Leasehold Deed of Trust and other security documents.

## ARTICLE 2.

### REPRESENTATIONS AND WARRANTIES OF CONTRACTING PARTY

Contracting Party makes the following representations and warranties in favor of the Lender as of the date hereof.

2.1 AUTHORIZATION. The execution, delivery and performance by contracting party of this Direct Agreement and the Assigned Agreements have been duly authorized by all necessary action on the part of Contracting Party and do not require any approvals except approvals which have previously been obtained and which are in full force and effect or which are routinely obtained during the ordinary course of business during the execution of the project.

2.2 EXECUTION AND DELIVERY; BINDING AGREEMENTS. Each of this Direct Agreement and the Assigned Agreements has been duly executed and delivered on behalf of contracting party by the appropriate officers of contracting party and constitutes the legal, valid and binding obligation of contracting party, enforceable against contracting party in accordance with its terms, except as the enforceability thereof may be limited by (a) bankruptcy, insolvency, reorganization or other similar laws affecting the enforcement of creditors' rights generally and (b) general equitable principles (whether considered in a proceeding in equity or at law).

2.3 NO DEFAULT. Neither Contracting Party nor, to Contracting Party's knowledge, nor any other party to the Assigned Agreements is in default of any of its obligations thereunder, and as of the date hereof, to Contracting Party's knowledge, all payments that are required under the Assigned Agreements to have been made by any party thereto have been made. To Contracting Party's knowledge, each party to the Assigned Agreements has complied with all conditions precedent to the respective obligations of such party to perform under the Assigned Agreements, except to the extent any such conditions precedent have been waived by the party or parties to the Assigned Agreements not obligated by such conditions precedent. [As used herein, "Contracting Party's knowledge" shall mean the actual knowledge, without duty of inquiry' of Contracting Party's Director of Public Works, Don Wilcox. Notwithstanding any provision of this Direct Agreement, in no event shall any liability accrue to Contracting Party by reason of any incorrect representation set forth herein, but Contracting Party shall be estopped to deny the truth of any such statement in the event of any dispute between Contracting Party and Lender, Project Owner, Tenant and/or Permitted Transferee.]

AGREEMENT VOID

**ARTICLE 3.  
MISCELLANEOUS**

3.1 GOVERNING LAW. THIS DIRECT AGREEMENT AND THE RIGHTS AND OBLIGATIONS OF THE PARTIES HEREUNDER SHALL BE CONSTRUED IN ACCORDANCE WITH AND BE GOVERNED BY THE LAWS OF THE STATE OF CALIFORNIA.

3.2 SUCCESSORS AND ASSIGNS. This Direct Agreement shall be binding upon and shall inure to the benefit of the parties and their permitted successors and assigns.

3.3 FURTHER ASSURANCES. Each of the parties hereby agrees to execute and deliver all such instruments and take all such action as may be necessary to effectuate fully the purposes of this Direct Agreement, subject to approval by Contracting Party's governing body in its sole and absolute discretion.

3.4 ENTIRE AGREEMENT. This Direct Agreement and any agreement, document or instrument attached hereto or referred to herein integrate all the terms and conditions mentioned herein or incidental hereto and supersede all oral negotiations and prior writings in respect to the subject matter hereof. In the event of any conflict between the terms, conditions and provisions of this Direct Agreement and any such agreement, document or instrument, the terms, conditions and provisions of this Direct Agreement shall prevail.

*[Signature page follows.]*

AGREEMENT VOID

IN WITNESS WHEREOF, the parties to this Direct Agreement have caused it to be duly executed and delivered as of the date first written above.

**CITY OF SOLEDAD,**  
a public body, corporate and politic,  
as Contracting Party

By: AGREEMENT VOID  
Name:  
Title:

**FOUNDATION WINDPOWER, LLC,**  
a California limited liability company,  
as FWP

By: \_\_\_\_\_  
Name: Matthew B. Wilson  
Title: Chief Executive Officer

**FOUNDATION HA ENERGY GENERATION,  
LLC,**  
a California limited liability company,  
as Borrower

By: \_\_\_\_\_  
Name: Matthew B. Wilson  
Title: Chief Executive Officer

**FOUNDATION CA FUND VII MASTER  
TENANT, LLC,**  
a California limited liability company,  
as Master Tenant

By: \_\_\_\_\_  
Name: Matthew B. Wilson  
Title: Chief Executive Officer

**FOUNDATION CA FUND VII OWNER, LLC,**  
a California limited liability company,  
as Owner

By: \_\_\_\_\_  
Name: Matthew B. Wilson  
Title: Chief Executive Officer

Accepted and Agreed:

**ZB, N.A. dba NATIONAL BANK OF ARIZONA,**  
as the Lender

AGREEMENT VOID

By: \_\_\_\_\_  
Name: Jon Bouvet  
Title: Vice President