

## **GIFTING AGREEMENT**

This Gifting Agreement for the Construction of a Humane Society (the “Agreement”) is made effective as of the date provided in Section 3.1, below, between the **City of Brookings**, a South Dakota municipal corporation (the “City”), and **The Brookings Regional Humane Society, Inc.**, a South Dakota nonprofit corporation (“BRHS”).

### **RECITALS**

- A.** BRHS is a non-profit corporation in the process of developing and constructing a new humane society facility (the “Project”).
- B.** BRHS is raising funds for the Project through a capital campaign.
- C.** The City owns a 5.5-acre parcel on Prince Drive (the “Property”). The City desires to gift the southern portion of the Property, approximately 2.5 acres in size, to BRHS as a contribution toward their Capital Campaign (the “Gifted Parcel”), pursuant to the terms, conditions, and specific purposes set forth herein. The parties believe the Gifted Parcel is an ideal location for the construction of the Project.
- D.** BRHS desires to accept the Gifted Parcel, and desires to construct the Project on the Gifted Parcel.

NOW, THEREFORE, in consideration of the mutual covenants and stipulations set forth in this Agreement, the parties agree as follows:

### **Section One The City’s Contribution**

- 1.1 **Gifted Parcel.** The City agrees to gift to BRHS, and BRHS agrees to accept, a gratuitous transfer of real property identified above as the “Gifted Parcel,” pursuant to the terms, conditions, and specific purposes set forth herein, with good and marketable title to the Gifted Parcel being vested in BRHS at Closing, subject to the Option to Purchase described in Section 4.2, below. This gift may be hereinafter referred to as the “City’s Contribution.”

### **Section Two Purpose of the Gifted Parcel**

- 2.1 The specific purpose of the transfer of the Gifted Parcel is to contribute toward the Project, with the Project to be located upon the Gifted Parcel. The specific improvements to the Gifted Parcel will be agreed upon in a separate Development Agreement between the City and BRHS.
- 2.2 BRHS agrees it must utilize the Gifted Parcel only for the Project. The City and BRHS desire to see the Project completed within ten years. In recognition of the City’s Contribution, BRHS agrees to use its best efforts to fund and construct the Project within ten years, and to construct the Project upon the Gifted Parcel, subject to the Option to Purchase described in Section 4.2, below.

## **Section Three Term of Agreement**

3.1 This Agreement will commence on the last to occur of the signing of this Agreement by the City Manager, the attestation of this Agreement by the City Clerk, the approval of this Agreement by ordinance or resolution adopted by the City Council, and the expiration of time, if any, within which the City Council's approval of this Agreement may be challenged by referendum following the publishing of the City Council's ordinance or resolution (the "Effective Date"), and will continue in full force and effect pursuant to the terms set forth herein, unless the Agreement is terminated earlier pursuant to the provisions contained herein.

## **Section Four Terms and Conditions**

4.1 The timeline and conditions for the City's Contribution are as follows:

- 4.1.1 The City will convey the Gifted Parcel to BRHS at a date mutually agreed upon by the parties (the "Closing"). The City will appoint three real property owners of the City to determine the fair market value of the Gifted Parcel, which will be recorded as an in-kind contribution from the City to BRHS.
- 4.1.2 BRHS will enter into an agreement with a qualified design firm to develop design documents, construction documents, a schedule, and a budget for the Project. The parties agree that all other specifications will be set forth in the Development Agreement.
- 4.1.3 The City will, upon request by BRHS, facilitate a Development Review Team (DRT) meeting to evaluate site readiness, including such issues as utilities, zoning, access, stormwater, and similar issues relevant to development. The City will also provide general development guidance throughout the project regarding infrastructure and site.
- 4.1.4 The parties agree to the estimated following timeline: Construction of the Project is anticipated to begin in the Fall of 2031, with a substantial completion date in Summer 2032, and a final completion date of Fall 2032. For purposes of this Agreement, the term, "substantial completion" means that a certificate of occupancy has been issued by the City. If construction has not commenced by September 1, 2036, or substantial completion is not accomplished by April 1, 2037, and the parties are not able to agree upon an extension, the City may exercise its Option to Purchase, described in Section 4.2, below.
- 4.1.5 BRHS will provide, to the City, periodic written construction status reports as requested by the City, no less than monthly.
- 4.1.6 BRHS is responsible for all costs and management of construction on the Gifted

Parcel. The City will provide advisory input and assistance only. BRHS construction requirements will be subject to the Development Agreement and any applicable zoning and other ordinances.

4.2 Option to Purchase. The Gifted Parcel will be conveyed subject to the Option to Purchase attached hereto as **Exhibit B**, which is incorporated herein by this reference (the “Option to Purchase”). A Memorandum of the Option to Purchase will be recorded at or immediately prior to Closing.

4.3 Closing Documents and Costs. Except as may be provided elsewhere in this Agreement, the City and BRHS agree to the following prorations and allocation of costs regarding this Agreement:

- 4.3.1 BRHS will pay the premium for any policy of title insurance on the Gifted Parcel it desires.
- 4.3.2 This transaction is exempt from real estate transfer fees pursuant to SDCL § 43-4-22 (2).
- 4.3.3 Because the City is a political subdivision of the State of South Dakota, the Property is exempt from real property taxes.
- 4.3.3 All other closing costs for this transaction will be paid for by the City.
- 4.3.4 The City and BRHS will each pay their own attorneys’ fees in connection with the preparation and negotiation of this Agreement and the consummation of the transactions contemplated herein.

4.4 Possession of Property; Risk of Loss. Possession of the Gifted Parcel will be transferred on the date of Closing, at which time all risk of loss with respect to the Gifted Parcel will be transferred from the City to BRHS.

## Section Five Council Approval

5.1 Council Approval. Because the City’s Contribution contains a number of conditions, including declaring the Property surplus property, this Agreement and the conditions set forth herein must be approved by City Council. The parties recognize and agree City Council approval will be sought for this gift, but the Agreement will not be executed by or on behalf of the City, until such approval is obtained and becomes final.

5.2 Contingent Upon Funding. Notwithstanding any provision of this Agreement to the contrary, any financial obligation of the City, if any, under this Agreement is contingent upon all funds necessary for the performance of this Agreement being budgeted, appropriated, and otherwise made available. If funds are not budgeted or appropriated for any fiscal year for contribution under the terms of this Agreement, this Agreement will impose no obligation on the City for payment. This Agreement is null and void except as to any contribution herein agreed

upon which has already been approved by City Council and for which funds have been budgeted and appropriated, and no right of action or damage may accrue to the benefit of BRHS, its successors, or assignees, for any further contributions.

## **Section Six Indemnification, Covenants, and Warranties**

6.1 BRHS agrees to defend, indemnify, and hold the City harmless from any and all claims or liabilities, including attorneys' fees, arising out of the provisions of the City's Contribution furnished to BRHS. BRHS covenants, warrants, and represents for the benefit of the City that BRHS is duly organized, validly existing, and in good standing under the laws of the State of South Dakota, and that the person executing this Agreement on behalf of BRHS is duly authorized to execute this Agreement and consummate the transaction contemplated hereby on behalf of the BRHS.

## **Section Seven Default Remedies**

7.1 A party will be in default if it breaches any of its obligations under this Agreement. In the event of a default, the other party will give to the party in default written notice of the default. If the party in default has not cured the default within 10 days of receipt of the notice of default, or commenced to cure and then proceed to complete the cure of the default within a reasonable period of time in the event the default is not capable of being cured within the 10 day period, then the party not in default may terminate this Agreement and seek any other remedy allowed under applicable laws or equity.

## **Section Eight Notice**

8.1 All notices, requests, demands or other communications required or permitted under this Agreement must be in writing and delivered either: (i) personally; (ii) by certified or registered mail, return receipt requested, postage prepaid; (iii) by a recognized overnight courier service (such as Fed Ex); or (iv) by email transmission made during normal business hours with a copy to follow by registered or certified mail, return receipt requested, postage prepaid or by overnight courier service, addressed as follows:

If to City:	City of Brookings Attn: Paul Briseno, City Manager 520 3 <sup>rd</sup> St., Ste 230 Brookings, SD 57006 Email: <a href="mailto:pbriseno@cityofbrookings-sd.gov">pbriseno@cityofbrookings-sd.gov</a>
With a copy to:	Woods, Fuller, Shultz & Smith P.C. Attn: J. Vincent Jones, City Attorney 300 S. Phillips Ave., Ste. 300 Sioux Falls, SD 57104

Email: vince.jones@woodsfuller.com

If to BRHS: Brookings Regional Humane Society  
Attn: Brianna Johnson, Board President  
120 W. 2<sup>nd</sup> St. S.  
Brookings, SD 57006  
Email: [braun.brianna@outlook.com](mailto:braun.brianna@outlook.com)

With a copy to: Teesdale Law Office PLLC  
Attn: Tony Teesdale  
423 8<sup>th</sup> St. S.  
Brookings, SD 57006  
Email: [tony@teesdalelaw.com](mailto:tony@teesdalelaw.com)

The above parties or legal counsel may change their contact information at any time by giving to the other parties and legal counsel written notice of the updated contact information.

## Section Nine Miscellaneous Provisions

- 9.1 Governing Law/Venue/Jurisdiction. This Agreement will be governed by the laws of the State of South Dakota. Venue of any litigation will lie in Brookings County, South Dakota.
- 9.2 Entire Agreement. This Agreement, including any amendments to it, contains the entire agreement of the parties regarding the subject of this Agreement. This Agreement supersedes and replaces the terms of any prior agreement, oral or written, between the parties.
- 9.3 Headings. The headings contained in this Agreement are for convenience only and will not be used to interpret or construe its provisions.
- 9.4 Recitals Substantive. The Recitals set forth above are substantive to this Agreement and are incorporated into this Agreement as if fully set forth in this Section.
- 9.5 Amendment. This Agreement may not be amended or modified orally. Any amendment or modification will be valid only if agreed upon, in writing, by the parties.
- 9.6 Waiver. Any term or condition of this Agreement may be fully or partially waived only by a writing signed by the party which is entitled to benefit of the term or condition.
- 9.7 Severability. If any term, restriction, or covenant of this Agreement is deemed illegal or unenforceable, all remaining terms, restrictions, and covenants hereof will remain unaffected and in full force and effect.
- 9.8 Survival. All representations, warranties, covenants, and agreements, including but not limited to indemnification agreements, of the parties will survive: (a) the termination or the

closing of the transactions contemplated in this Agreement; and (b) the delivery of the Warranty Deed described in this Agreement.

9.9 Assignment. Neither party may assign rights or delegate duties under this Agreement to any party. This Agreement will be binding upon the heirs, executors, administrators, successors, and assigns of the parties hereto.

9.10 Binding Effect. This Agreement is subject to final approval by resolution by the City Council of the City, as further set forth above. Thereafter, the provisions of this Agreement will be binding upon and inure to the benefit of the parties and their respective successors and permitted assigns as set forth in this Agreement.

9.11 Waiver of Jury Trial. The parties to this Agreement agree that any dispute arising out of or relating to this Agreement will be heard by a judge and not a jury. Each party knowingly, voluntarily, and intentionally waives any right they may have to a trial by jury in any legal proceeding arising out of or relating to this Agreement.

9.12 Counterparts. This Agreement may be executed in one or more counterparts, each of which will be deemed to be an original but all of which, when taken together, will be one and the same document. Counterparts may be signed and delivered via electronic mail (including by .pdf, .tif, .gif, .jpeg, or any electronic signature complying with the U.S. federal ESIGN Act of 2000, e.g., [www.docusign.com](http://www.docusign.com)) and any counterpart so delivered will be deemed to have been duly and validly delivered and be valid and effective for all purposes.

*[Signatures on Following Page]*

**CITY OF BROOKINGS:**

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By: Paul Briseno, City Manager

**BRHS:**

THE BROOKINGS REGIONAL HUMANE  
SOCIETY, INC.

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By: Brianna Johnson, its Board President

**ATTEST:**

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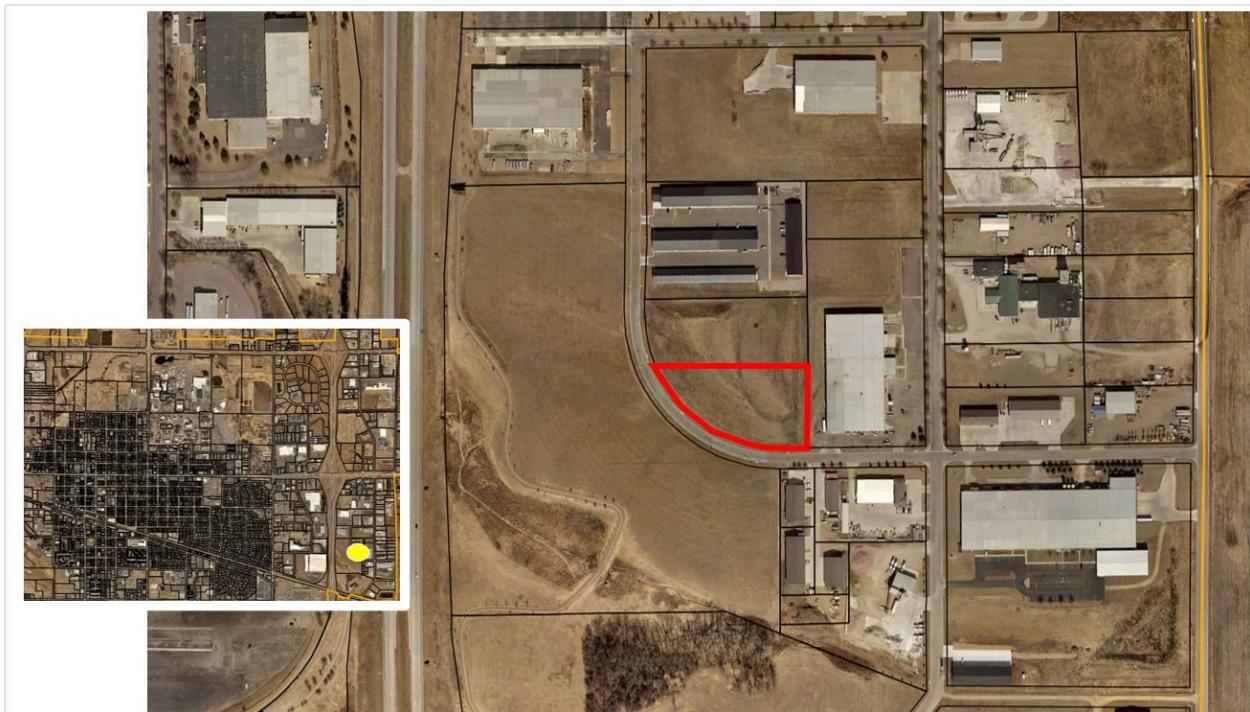
Bonnie Foster, City Clerk

**EXHIBIT A**  
**Legal Description/Property**

**Legal Description:**

**TELKAMP INDUSTRIAL ADDITION, LOT 3B BLOCK 2 (2.51± ACRES)**

**Drawing of Property is attached.**



**EXHIBIT B**  
**Option to Purchase**

**Gifting Agreement**  
City of Brookings / BRHS