

DEVELOPMENT AGREEMENT

Brookings Marketplace Property

This Agreement, dated December 14, 2016, is entered into between the City of Brookings, a South Dakota municipal corporation (CITY); and Brookings Marketplace, LLC, a South Dakota limited liability company (DEVELOPER). This Agreement refers to the City and the Developer collectively as the "Parties" and singularly as the "Party".

RECITALS

WHEREAS, City is the owner of the following real property located within the City of Brookings:

- A) Block 9 Wiese Addition
(former DOT property; 26 acres +/-) Hereinafter sometimes referred to as the "subject parcel" or "Project" or "the Property".
- B) Block 3 Wiese Addition
(Research & Technology Center; 5 acres +/-) and

WHEREAS, in order to strengthen the public planning process and to encourage private participation in comprehensive planning, the City has solicited proposals for development of the subject parcel and has selected Developer to develop the subject parcel pursuant to this Development Agreement; and

WHEREAS, Developer has presented to the City a development proposal for a commercial development; said development to include the above-described property as further identified in this Agreement (the Project); and

WHEREAS, City intends to sell the above lots to Developer at market value but with a guaranteed minimum amount as further stipulated in this Agreement; and to assist Developer with its planned development through the use of various incentives, programs, policies, and actions; and

WHEREAS, the parties agree this project is a phased development, reasonably following a comprehensive master plan for development; that the development costs will be financed by the Developer and repaid over time through the use property tax increment generated from the Project, and that the City shall have approval over all development plans of the Project prior to Developer commencing construction of each respective phase, and

WHEREAS, this Agreement permits the Developer to proceed with its due diligence, inspections, pre-leasing and financing with assurance that, subject to the conditions of this Agreement, the Project may proceed; and

WHEREAS, this Agreement will minimize uncertainty in planning for and securing orderly development of the Project, provide the certainty necessary for the Developer to make significant investments in public infrastructure and other improvements, assure the timely and progressive installation of necessary improvements, provide public services appropriate to each stage of development, establish phasing for the orderly and measured build-out of the Project consistent with the desires of the City to develop the Property in a manner consistent with the

development objectives of the City as outlined in the City's request for proposals, and to have development occur at a pace that will assure integration of the new development into the existing community, and provide significant public benefits to the City that the City would not necessarily receive without this Agreement; and

WHEREAS, in exchange for the benefits to the City, the Developer desires to receive the assurance that it may proceed with the Project in accordance with the existing land use ordinances, subject to the terms and conditions contained in this Agreement and to secure the benefits afforded the Developer under this Agreement.

NOW THEREFORE, in consideration of the terms and conditions of this Agreement, the Developer and City agree to the foregoing recitals and as follows:

1. Sale of Property as it pertains to Block 9 Wiese Addition.

Subject to the terms and conditions of this Agreement, and applicable subsequent agreements and amendments related thereto, the City agrees to convey to Developer the following described property:

Block Nine (9) of Wiese Addition to the City of Brookings, County of Brookings, State of South Dakota.

The City will utilize SDCL 9-27-36; SDCL 9-27-37; and SDCL 9-54-1 to facilitate the transfer of the Property. The Parties intend and determine that the provisions of this Agreement shall constitute covenants which shall run with the Property, and the burdens and benefits of this Agreement shall bind and inure to all successors in interest to the Parties to this Agreement.

2. Right of First Refusal as it pertains to Block 3 Wiese Addition.

The City agrees to provide a First Right of Refusal to the Developer for the parcel described as Block 3 Wiese Addition, subject to the terms and conditions set forth at a future time and duly promulgated by a separate agreement executed subsequent to January 1, 2018. Such First Right of Refusal shall also be subject to the provisions of SDCL 9-27-36; SDCL 9-27-37; and SDCL 9-54-1. In the event the City sells Block #3 Wiese Addition to Developer, it shall be in an "as is" condition at the time of the purchase agreement execution and the purchase price based on an MAI appraisal. The Developer shall be given 90 days from the date the Developer receives a written notice of the City's intent to sell to decide whether or not to exercise its right of purchase. In the event the City sells to someone other than the Developer, the City agrees the buyer will develop or re-develop Block 3 Wiese Addition for end uses that are compatible with the final development plan of the subject parcel and subject to compatible zoning regulations.

3. Consideration/Purchase price of subject parcel.

Unless Developer notifies City on or before December 31, 2018 (or such later date as mutually agreed to by the parties in Section 4) that the Project will not proceed, Developer agrees to pay, and City agrees to sell, the subject parcel in multiple phases and as such, payments for land may be made pro rata commensurate with the phased development of

the total subject parcel. Developer shall pay the City a minimum of \$1,600,000 for the Property in aggregate, in a time and manner in accordance with the terms and conditions of this Agreement and subsequent supplemental Development Agreements contemplated in Section 6. However, the total aggregate amount of purchase price must be paid by December 31, 2023 regardless of the progress of development. For purposes of clarification, the Property does not include Block 3 of Wiese Addition.

4. Due diligence Period.

Following execution of this Agreement, Developer shall have a period of time to perform its due diligence, to inspect the property, to pre-lease its Project, to arrange financing and to enter into the additional Development Agreement(s) described in Section 6 below. The Developer shall have until December 31, 2018 to perform this due diligence and to determine if the Project will proceed. If Developer is pursuing its due diligence with good faith and diligent efforts, as determined by the City, Developer may, at its option, by written notice to the City no later than September 1, 2018, request an extension for a supplemental due diligence period for a length of time mutually agreed upon. The City shall have unilateral authority to accept or reject the request for an extension. During this period of due diligence, the Developer shall have access to the Property for any inspections needed. Developer agrees to return the Property as nearly as possible to its pre-inspection condition and Developer shall pay for and be responsible for any damages to the Property during this due diligence period and found to be caused by an act of the Developer in performance of the due diligence. During the due diligence period, the City agrees to negotiate exclusively with Developer concerning the development of the Project. City further agrees to forward all inquiries for development by prospective businesses and their agents to Developer.

Due diligence activities include but may not be limited to:

- Completion of two community meetings for which the purpose shall be to gather input on the types of development that would be beneficial to the Project.
- Completion of site analysis work including but not limited to engineering studies, environmental analysis, and drainage studies, traffic analysis, etc.
- Finalization of the Project Development Plan.
- Submission and approval of any necessary zoning changes.
- Completion of Community Needs Assessment.
- Attendance at the May ICSC conference in 2017 and 2018 to begin national marketing.
- Commencement of regional marketing initiatives.
- Submission of a minimum of two progress reports to the City Council; and additional progress reports to City staff as deemed appropriate.
- Other activities as mutually agreed to by both parties and deemed necessary.

5. Phased Development.

Both parties to this Agreement anticipate and agree development of the subject parcel will most likely occur in a phased and staged manner. The exact composition of sections of the subject parcel comprising a phase shall be mutually determined by both parties over the course of the project. Following the due diligence period, Developer agrees to accept each

individual parcel of the property in an "as is" condition and Developer will, thereafter, be responsible for any expenses involving the subject parcel unless otherwise agreed, in writing, with the City.

6. Additional Development Agreements.

As a phased project, both parties agree that supplemental Development Agreements may be necessary to address the particular requirements of each respective parcel of the Project in a manner reasonably consistent with the master plan.

7. Proposed Project Schedule.

The proposed schedule for the Project is as follows:

- a. Execution of Development Agreement: December, 2016
- b. Completion of Due Diligence Period by Developer: December 31, 2018 and may be extended upon mutual Agreement of both parties.
- c. Initial phase 1 property transfer: early 2019.
- d. Initial phase 1 construction development: April, 2019.
- e. Development Project completion: not to exceed December 31, 2023 (Build-out, lease-up will extend past development of site.)

8. Provisions necessary for Closing.

The conveyance of the subject parcel or any subdivided portion thereof resulting from platting shall not occur until the Developer has completed the following:

- a. Completion of the due diligence process as determined by the Developer.
- b. The initial development plan and master development plan have been approved by the City.
- c. Plans and specifications for the parcel(s) to be conveyed have been approved by the City, for which approval will not be unreasonably withheld.
- d. A final development agreement with terms and conditions pertaining to financial assurances, guaranteeing completion of the project and other applicable items have been approved by the City.
- e. Documentation satisfying any applicable division of net sales proceeds have been submitted and deemed acceptable by the City as described in Section 16.

9. Tax Increment Finance.

As an incentive to development, tax increment financing is hereby authorized under the following terms and conditions and consistent with the City's tax increment policy.

- a. Developer may apply for tax increment financing pursuant to the City's policy governing the application and use of tax increment finance, and shall pay the applicable application fee. City agrees to expeditiously process said application and approve a mutually agreeable tax increment finance plan for the tax increment district. The parties agree that, pursuant to the master development plan, more than one tax increment district may be necessary.

- b. Developer shall advance all development, construction and project costs identified in the tax increment plan for reimbursement by future tax increment proceeds. The tax increment plan shall describe the eligible costs to be reimbursed from tax increment proceeds and the aggregate maximum amount and duration for which tax increment proceeds can be reimbursed.
- c. As stipulated in the tax increment policy, properties in a certified tax increment district are ineligible for the Brookings County's discretionary property tax formula until the district is de-certified.
- d. The City's obligation to reimburse Developer for any costs identified in the tax increment plan shall be terminated in the event the City approval of the tax increment plan or any tax increment process related thereto, is referred by the voters and the voters do not approve the tax increment plan.

10. City Obligations.

Upon receipt of written notice to the City from the Developer that Developer has completed Due Diligence work and has made that feasibility requirements have been satisfied, the City will do the following:

- a. Assist the Developer with the tax increment application and tax increment plan consistent with this Development Agreement.
- b. To the extent they are available, apply or assist the Developer in the application for grants for infrastructure, soils corrections, storm water enhancement and wetland mitigation grants.
- c. Keep Developer informed and updated on the on-going status of the SDDOT Highway 14 improvement project.
- d. Provide a title commitment, at City expense, for a standard owner's policy of title insurance based on the purchase price of the real property to Developer, including standard searches, all satisfactory to Developer.
- e. Transfer the real property to the Developer consistent with the terms and conditions with this Agreement and the master development plan.

11. Developer Obligations.

A. Developer understands and agrees to the following obligations of the Developer:

- a. Complete site development and environmental assessment.
- b. Confirm land use regulations and develop the property consistent with all applicable regulations and Agreements with the City.
- c. Complete the analysis of necessary public infrastructure and street/utility improvements.
- d. Provide the City with preliminary cost estimates for infrastructure and street/utility improvements.
- e. Prepare preliminary land use plan based on market analysis and meetings with various stakeholders as well as national retail market organizations.
- f. Develop preliminary marketing strategy with implementation steps involving local government and university organizations.
- g. Pay the usual and customary builder permit fees and permits.
- h. Pay the usual and customary application and development fees of the City.

- i. Pay all environmental phase I survey costs associated with development of the project prior to the closing and transfer of each staged/phased parcel.
 - j. Submit an application for the use of tax increment finance and adhere to applicable terms and conditions of the duly-approved tax increment plan to be subsequently negotiated.
 - k. Procure goods and services for infrastructure construction and site build-out; and be responsible for all aspects of construction.
- B. Improvements. The Developer shall develop the Property in accordance with and subject to the terms and conditions of this Agreement, and any amendments to this Agreement as, from time to time, may be approved pursuant to this Agreement. The failure of the Developer to comply with any term or condition of or fulfill any obligation of the Developer under this Agreement, or any amendments to this Agreement as may have been approved pursuant to this Agreement, shall constitute a default by the Developer under this Agreement. Any such default shall be subject to cure by the Developer as set forth in Section 13 hereof.
- C. Developer's Obligations to Pay for Improvements. Except as otherwise provided herein, the Developer shall be responsible, at its sole cost and expense, to make the contributions, improvements, dedications and conveyances set forth in this Agreement.
- D. City's Good Faith in Processing. The City agrees that it shall accept, in good faith, for processing, review and action, all complete applications for zoning, special permits, development permits, tentative maps, subdivision maps or other submissions for use of the Project in accordance with the this Agreement. The City shall inform the Developer, upon request, of the necessary submission requirements pertaining to a permit application, and shall review said application and schedule the application for review or hearing by the appropriate authority.

12. Performance metrics; reversionary considerations and clawbacks.

- A. Specific Development Obligations. The Developer and the City have agreed that the development of the Property by the Developer is subject to certain specific development obligations, described herein. These specific development obligations, together with the other terms and conditions of this Agreement, provide the incentive and consideration for the City entering into this Agreement.
- B. Development Timing. The Developer shall be obligated to comply with the terms and conditions of this Development Agreement at those times specified in this Development Agreement. The parties acknowledge that the Developer cannot at this time predict with certainty when or the rate at which phases of the Property will be developed. Such decisions depend upon numerous factors which are not all within the control of the Developer, such as market demand and other factors. It is the intent of City and the Developer to hereby acknowledge and provide for the right of the Developer to develop the Project in such order and at such rate and times as the Developer deems appropriate within the exercise of its sole business judgment, subject to the terms, requirements and conditions of this Development Agreement. City acknowledges that such a right is consistent with the intent, purpose and understanding of the parties to this Development Agreement. The Developer shall use its best efforts, in accordance

with its business judgment and taking into consideration market conditions and other economic factors influencing the Developer's business decisions, to commence or to continue development, and to develop the Project in a regular, progressive and timely manner in accordance with the provisions and conditions of this Development Agreement. Developer and City intend that except as otherwise provided herein, this Agreement shall be subject to any ordinance, resolution, regulation or policy which is adopted and applied on a uniform, city-wide basis and directly concerns an imminent public health or safety issue. In such case, City shall apply such ordinance, resolution, regulation or policy uniformly, equitably and proportionately to Developer and the Property and to all other public or private owners and properties directly affected thereby.

- C. The parties agree the orderly and measured build-out of the Project will allow for the absorption of the new development into the community and the integration of the Project into the community.
- D. Annual Review. The City Manager shall, at least every twelve (12) months during the term of this Agreement, review the extent of good faith substantial compliance by the Developer with the terms and conditions of this Agreement. Such periodic review shall be limited in scope to compliance with the terms and conditions of this Agreement.

The City Manager shall provide thirty (30) days prior written notice of such periodic review to the Developer. Such notice shall require the Developer to demonstrate good faith compliance with the terms and conditions of this Agreement and to provide such other information as may be reasonably requested by the City Manager and deemed by him/her to be required in order to ascertain compliance with this Agreement.

If, following such review, the City Manager is not satisfied that the Developer has demonstrated good faith compliance with all the terms and conditions of this Agreement, or for any other reason, the City Manager may refer the matter along with his/her recommendations to the City Council.

Failure of the City to conduct an annual review shall not constitute a waiver by the City of its rights to otherwise enforce the provisions of this Agreement nor shall the Developer have or assert any defense to such enforcement by reason of any such failure to conduct an annual review.

13. Default, Remedies, Termination.

- A. General Provisions. Subject to extensions of time by mutual consent in writing, failure or unreasonable delay by either Party to perform any term or provision of this Agreement shall constitute a default. In the event of default or breach of any terms or conditions of this Agreement, the Party alleging such default or breach shall give the other Party not less than thirty (30) days notice in writing specifying the nature of the alleged default and the manner in which said default may be satisfactorily cured. During any such thirty (30) day period, the Party alleged to be in default shall not be considered in default for purposes of termination or institution of legal proceedings.

After notice and expiration of the thirty (30) day period, if such default has not

been cured or is not being diligently cured in the manner set forth in the notice, the other Party to this Agreement may at its option:

1. Terminate this Agreement, in which event neither Party shall have any further rights against or liability to the other with respect to this Agreement or the Property; or
2. Institute legal or equitable action to cure, correct or remedy any default, including but not limited to an action for specific performance of the terms of this Agreement;

In no event shall either Party be liable to the other for money damages for any default or breach of this Agreement.

- B. Developer's Default; Enforcement. No building permit shall be issued or building permit application accepted for the building shell of any structure on the Property if such applicant or any entity or person controlling such applicant is in default under the terms and conditions of this Agreement unless such default is cured or this Agreement is terminated. The Developer shall cause to be placed in any covenants, conditions and restrictions applicable to the Property, or in any ground lease or conveyance thereof, the express provision for an owner of the Property, lessee or City acting separately or jointly to enforce the provisions of this Agreement and to recover attorneys' fees and costs for such enforcement.
- C. Enforced Delay, Extension of Times of Performance. In addition to specific provisions of this Agreement, performance by either Party hereunder shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, walkouts, riots, floods, earthquakes, fires, casualties, acts of God, governmental entities, enactment of conflicting state or federal laws or regulations, new or supplementary environmental regulation, litigation, moratoria or similar bases for excused performance. If written notice of such delay is given to the City within thirty (30) days of the commencement of such delay, an extension of time for such cause shall be granted in writing for the period of the enforced delay, or longer as may be mutually agreed upon.

In the event litigation is initiated by any party other than Developer that challenges any of the approvals for the Project and an injunction or temporary restraining order is not issued, Developer may elect to have the term of this Agreement tolled, i.e., suspended, during the pendency of said litigation, upon written notice to City from Developer. The tolling shall commence upon receipt by the City of written notice from Developer invoking this right to tolling. The tolling shall terminate upon the earliest date on which either a final order is issued upholding the challenged approvals or said litigation is dismissed with prejudice by all plaintiffs. In the event a court enjoins either the City or the Developer from taking actions with regard to the Project as a result of such litigation that would preclude any of them from enjoying the benefits provided by this Agreement, then the term of this Agreement shall be automatically tolled during the period of time such injunction or restraining order is in effect.

- D. Limitation of Legal Actions. In no event shall the City, or its officers, agents or employees, be liable in damages for any breach or violation of this Agreement, it being expressly understood and agreed that the Developer's sole legal remedy for a breach or violation of this Agreement by the City shall be a legal action in mandamus, specific performance or other injunctive or declaratory relief to enforce the provisions of this Agreement.

14. Default-reversion

If, after transfer of the subject parcel or any portion thereof by the City to Developer, the project goes into default, or is not completed for any reason and such default or failure continues after a reasonably acceptable notice and cure period, and the property has yet to become a forfeiture to a lender; the property shall revert to the City at the same price the Developer paid the City. If the above-described default occurs and the property has become a forfeiture to a lender, the parties agree to work with the lender for a subsequent agreement mutually agreeable that preserves the City's option to re-acquire the property.

The Developer also agrees to provide to the City any existing infrastructure construction plans and specifications of the project in the Developer's possession and for which the Developer has already rendered compensation to any consultants, at no cost to the City, so the City may continue the project by other means.

15. Developer compensation.

Developer will be reimbursed by the City an aggregate amount of \$140,000 for initial costs associated with the expenses incurred for the due diligence period as described in Section 4, in four installments on the following performance milestone schedule:

- First payment of \$25,000 upon execution of this Development Agreement.
- Second payment of \$40,000 upon completion of two community meetings and submission of the application for first re-zoning of an initial phase.
- Third payment of \$25,000 upon first progress report submitted to the City.
- Fourth payment of \$50,000 upon first letter of intent from a prospective tenant/buyer/business is submitted to the City.

The City shall be reimbursed this \$140,000 amount from increment generated from the project pursuant to the approved tax increment finance plan. Both parties recognize the Developer will also incur additional expenses including but not limited to: site and development marketing activities, legal and other due diligence expenses, design development fees and expenses, and developer fees. Said amount shall be an eligible reimbursement from tax increment proceeds under the approved tax increment finance plan to the extent permitted by law; and will be remitted to the Developer commensurate with other tax increment proceeds associated with financing the development of the subject parcel pursuant to the approved tax increment finance plan.

16. Land Purchase.

Duly-platted lots and blocks of the subject parcel will be conveyed from the City as seller to the Developer as purchaser in phases commensurate with marketing and development considerations. The purchase price shall be \$1.41 per square foot of land conveyed. If Developer sells any portion of the subject parcel to an unrelated end user, Developer and

City shall share in the proceeds of such sale as follows: After all property transaction costs have been determined, the remaining net sales proceeds from the Developer to the end user shall be divided, with 80 percent payable to the Developer and 20 percent remitted to the City. The City shall have no responsibility for the property conveyance from the Developer to the end user. The Developer and City shall mutually agree on the scope and extent of documentation necessary to satisfy the division of the net sales proceeds.

17. Plans and Specifications.

Developer agrees to prepare, at Developer's expense, an engineered Initial Development Plan that addresses zoning, platting, and all applicable subdivision regulations for the subject parcel in its entirety. It is understood such provisions of the Plan will adhere to all applicable and standard practices and procedures. The Initial Development Plan shall be approved by the City, for which approval will not be unreasonably withheld. Such plans shall include, but are not limited to, lot and block design, street layout, easement and right-of-way dedication, water systems, sanitary sewer systems, storm sewer systems, electrical, natural gas, and telecommunication systems, street lighting, curb and gutter, signage, and other infrastructure deemed necessary by the parties. Parties agree the street system shall be public with the right-of-way and street improvements dedicated to the City upon acceptance by the City. Such acceptance requires construction adherence to approved plans and specifications. Parties agree storm water plan(s) will be necessary and provided by the Developer. City agrees to provide technical assistance to the Developer's engineer in the development of the Initial Development Plan.

18. Rules, Regulations and Official Policies.

1. For the term of this Agreement, the rules, regulations, ordinances and official policies governing the permitted uses of land, the density and intensity of use, design, improvement and construction standards and specifications applicable to the development of the Property, including the maximum height and size of proposed buildings, shall be those rules, regulations, ordinances and official policies in force on the effective date of this Agreement. Except as otherwise provided in this Agreement, to the extent any future changes in the zoning ordinance or any future rules, ordinances, regulations or policies adopted by the City purport to be applicable to the Property but are inconsistent with the terms and conditions of this Agreement, the terms of this Agreement shall prevail, unless the Parties mutually agree to amend or modify this Agreement. To the extent that any future changes in the zoning ordinance or any future rules, ordinances, regulations or policies adopted by the City are applicable to the Project and are not inconsistent with the terms and conditions of this Agreement, such future changes in the zoning ordinance or such future rules, ordinances, regulations or policies shall be applicable to this Project.

(a) This section shall not preclude the application to development of the Project of changes in City ordinances, regulations or policies, the terms of which are specifically mandated and required by changes in state or federal laws or regulations. In the event state or federal laws or regulations enacted after the date of this Agreement prevent or preclude compliance with one or more provisions of this Agreement or require changes in plans, maps or permits approved by the City, this Agreement shall be modified,

extended or suspended as may be necessary to comply with such state or federal laws or regulations or the regulations of such other governmental jurisdiction.

To the extent that any actions of federal or state agencies (or actions of regional and local agencies, including the City, required by federal or state agencies) have the effect of preventing, delaying or modifying development of the Project, the City shall not in any manner be liable for any such prevention, delay or modification of said development. The Developer is required, at its cost and without cost to or obligation on the part of the City, to be subject to such development restrictions as may be necessary or appropriate by reason of such actions of federal or state agencies.

(b) Nothing herein shall be construed to limit the authority of the City to adopt and apply codes, ordinances and regulations which have the legal effect of protecting persons or property from conditions which create a health, safety or physical risk.

2. All project construction, improvement plans and final maps for the Project shall comply with the rules, regulations and design guidelines in effect at the time the construction, improvements, plan or final map is approved. Unless otherwise expressly provided in this Agreement, all city ordinances, resolutions, rules, regulations and official policies governing the design and improvement and all construction standards and specifications applicable to the Project shall be those in force and effect at the time the applicable permit is granted. Ordinances, resolutions, rules, regulations and official policies governing the design, improvement and construction standards and specifications applicable to public improvements to be constructed by Developer shall be those in force and effect at the time the applicable permit approval for the construction of such improvements is granted. If no permit is required for the public improvements, the date of permit approval shall be the date the improvement plans are approved by the City or the date construction for the public improvements is commenced, whichever occurs first.

3. Uniform Codes applicable. This Project shall be constructed in accordance with the requirements of the International Building, Mechanical, Plumbing, Electrical, and Fire Codes, in effect at the time of approval of the appropriate building, grading, encroachment or other construction permits for the Project. If no permits are required for the infrastructure improvements, such improvements shall be constructed in accordance with the provisions of the codes delineated herein in effect at the start of construction of such infrastructure.

4. This section shall not be construed to limit the authority or obligation of the City to hold necessary public hearings, to limit discretion of the City or any of its officers or officials with regard to rules, regulations, ordinances, laws and policies which require the exercise of discretion by the City or any of its officers or officials, provided that subsequent actions shall not conflict with the terms and conditions of this Agreement.

19. Infrastructure construction.

Developer shall be responsible for engineered plans and drawings suitable for construction, and be responsible for overall infrastructure financing, installation and construction of the subject parcel consistent with approved plans by the City as provided in Section 17 of this

Agreement. Developer agrees to solicit, encourage, and utilize all reasonable and prudent means to employ or contract with local contractors, vendors, and service providers.

20. Hold Harmless indemnification.

The Developer hereby agrees to and shall hold the City, its elective and appointive boards, commissions, officers, agents and employees harmless from any liability for damage for personal injury, including death, as well as from claims for property damage, which may arise from the Developer's or the Developer's contractors, subcontractors, agents, or employees' operations under this Agreement, whether such operations be by the Developer, or by any of the Developer's contractors, subcontractors, or by any one or more persons directly or indirectly employed by or acting as agents for the Developers or any of the Developers' contractors or subcontractors.

In the event of any legal action instituted by a third party or any governmental entity or official arising out of the approval, execution, or implementation of this Agreement (exclusive of any such actions brought by the Developers), the Developer agree to and shall cooperate fully and join in the defense by the City of such action; provided, however, that the City and the Developer shall each bear their own respective costs, if any, arising from the defense. Such agreement by the Developer does not include any agreement to indemnify the City and its elective and appointive boards, commissions, officers, agents, and employees from any such legal actions.

City agrees to indemnify, defend, and hold harmless the Developer its agents, employees, contractors, and subcontractors for claims made against the Developer arising from the City's actions pertaining to the advertising, review, or selection of a Developer, or any actions the City has taken or may take in its efforts to seek development of the subject parcel.

With regard to a limitation of legal actions, in no event shall the City, or its officers, agents or employees, be liable in damages for any breach or violation of this Agreement, it being expressly understood and agreed that the Developer's sole legal remedy for a breach or violation of this Agreement by the City shall be a legal action in mandamus, specific performance or other injunctive or declaratory relief to enforce the provisions of this Agreement.

21. Insurance.

Developer agrees to carry General Liability insurance in the amount of at least two million and no/100 dollars (\$2,000,000). Developer agrees to maintain and keep in effect such insurance for the duration of the project and shall provide copies of said insurance to the City. Developer agrees to require the construction contractor installing infrastructure improvements to carry Builders' Risk insurance covering the full replacement cost of all improvements and that such insurance remain in effect for the duration of the construction of each respective project phase.

22. Good Faith/Mutual Cooperation.

- a. At any time and from time to time before and after the execution of this Development Agreement, the City will, at the request of Developer, and without further consideration, promptly execute, acknowledge and deliver such further instruments and take such further action as Developer may reasonably request in order to consummate and confirm the transaction contemplated by this Agreement and to accomplish the purposes of this Agreement; however no such instruments or actions will impose upon the City any burden or obligation which is in excess of any burden or obligation specifically imposed upon the City pursuant to the terms of this Agreement.
- b. At any time and from time to time before and after the execution of this Development Agreement, Developer will, at the request of the City, and without further consideration, promptly execute, acknowledge and deliver such further instruments and take such further action as the City may reasonably request in order to consummate and confirm the transaction contemplated by this Agreement and to accomplish the purposes of this Agreement; however, no such instruments or actions will impose upon Developer any burden or obligation which is in excess of any burden or obligation specifically imposed upon Developer pursuant to the terms of this Agreement.

23. Contingency.

The obligation of the Purchaser to purchase the above-described property pursuant to this Agreement is contingent upon the following:

- a. The City provides clear and marketable title to the Buyer concerning the above-described real property, by Warranty Deed, which contains only easements, rights-of-way, and reservations of record.

If there are any title restrictions, defects or burdens to which the Developer objects, other than easements, rights-of-way and restrictions of record, such objection will be stated in writing to City, and City will be allowed a reasonable time of not less than sixty (60) days to which to correct the same, and the Closing date will be delayed for not less than sixty (60) days to provide City with time to correct said defect.

- b. The parties also acknowledge the following contingency is also a condition precedent to the performance of this Agreement by the City. Briefly stated, the contingency concerns the right of the public to petition for referendum concerning this transaction. This is viewed by the City as unlikely, and discussed at greater length in subsection (i) below.
 - (i) Referendum/election. The City's obligation to sell the property described herein will be terminated if the City Council's decision to sell the above-described property is referred by the voters and the voters do not approve

the sale. "Referred" means a Petition to Refer, signed by the requisite residents, is filed and the voters of the City, at an election, vote to nullify the decision of the City to sell the property described herein. In the event of a successful referral, the obligation of the City to sell the above-described property pursuant to this or any subsequent Development Agreement will be null and void. This contingency will be waived at the later of the expiration date of any referendum period if there is no referendum, or the date following the election canvassing if there is a referendum election, and the sale is approved at the referendum election. However, a referendum decision by voters of the City which does not approve the sale will permit the City to terminate this Agreement at no cost or liability to the City. A referendum is not likely but all government real estate transactions are subject to the possibility of a referendum. The City will be able to waive this contingency 20 days after publication of the Resolution approving this Development Agreement.

24. Assignment.

This Agreement shall not be assigned by Developer to another entity without the approval of the City, for which approval shall not be unreasonably withheld, provided:

- a. The assignee has the financial ability to meet the obligations proposed to be assigned and to undertake and complete the obligations of this Agreement affected by the assignment; and
- b. The proposed assignee has adequate experience with residential or non-residential developments of comparable scope and complexity to the portion of the Project that is the subject of the assignment.

Developer may assign it to another entity controlled by or under common control with Developer without the City's consent.

25. Covenants Running with the Land.

All provisions of this Agreement shall be enforceable as equitable servitudes and constitute covenants running with the land. Each covenant to do, or refrain from doing, some act with regard to the development of the Property: (a) is for the benefit of and is a burden upon the Property; (b) runs with the Property and each portion thereof; and (c) is binding upon each Party and each successor in interest during ownership of the Property or any portion thereof.

26. Signage.

Developer shall be allowed to install signage advertising the project following execution of this Agreement with the design, number, and location(s) mutually agreed upon by both parties. Any such signage must follow applicable signage ordinances, and permits and fees shall be Developer's responsibility. The provisions of this Section do not apply to finished parcels designated for commercial use.

27. Amendments. This Agreement may be amended from time to time by mutual consent of the Parties. The Parties acknowledge that refinement and further implementation of the Project may demonstrate that certain changes may be appropriate with respect to the details and performance of the Parties under this Agreement. The Parties desire to retain a certain degree of flexibility with respect to the details of the Project and with respect to those items covered in the general terms of this Agreement. If and when the Parties find that clarifications, changes or minor adjustments are necessary or appropriate, they shall effectuate such clarifications, changes or minor adjustments through a written Amendment approved in writing by the Developer and the City.

28. Sales Tax Revenue as Economic Development Incentive

The Developer and subsequent qualifying businesses in the project may apply to the City to participate in the sales tax economic development incentive program pursuant to City of Brookings Resolution 15-011 and program requirements related thereto.

29. Liquor licenses

Both parties understand and agree some businesses seeking to locate in the project area may apply for any type of alcohol or malt beverage license for their respective business that may be available, and that said applications shall follow established procedures pursuant to City and State regulations.

30. Survey.

If required, Developer shall be pay for any surveys required throughout the project.

31. Warranties from the City.

City, as the Seller, hereby represents, warrants and covenants to Developer, as the Buyer, the following:

- a. City is fee-owner of the described subject parcels with full authority to sell and transfer the property to the Buyer.
- b. To the best of the City's knowledge, the property is in full compliance with all applicable laws, statutes, ordinances, codes, rules, including any regulations relating to environmental protection, pollution, safety, health, building, fire, and zoning. City has no knowledge of any proposed or pending proceeding to change or redefine the current zoning classification of all or any portion thereof.
- c. There is no action or proceeding pending against City pertaining to the subject property.
- d. City has no knowledge of any hazardous materials (as defined under any federal, state, or local law or ordinance) that have been restored, released, removed, or placed, held, located or disposed of on, under, or at the property or any part thereof and, to the best of the City's knowledge, no part of the property has ever been used as a treatment, storage, or disposal site for any such hazardous material, except as follows: A Phase 1 Environmental review indicated that a portion of the subject property was the location for road salt storage. This condition has been remediated.

- e. To the best of City's knowledge, there are no unrecorded contracts, leases, easements, or other agreements, or claims of any third party, affecting the use, title, occupancy or development of the property.
- f. Each and every undertaking and obligation of City under this Agreement shall be performed by City in a timely manner.
- g. To the best of City's knowledge, the City has made property disclosure to Developer, as required by law, as to all wells, private sewer systems, and aboveground or underground storage tanks located on the property. The former owner of the subject property had underground fuel tanks on the site which were removed by the former owner, who also undertook soils remediation. The City agrees to provide any and all environmental reports and analysis in its possession pertaining to the site.
- h. City warrants there are no outstanding special assessments or taxes encumbering the property to be transferred.

32. Closing costs.

Developer as Buyer shall be responsible for all premiums required for title insurance, mortgage recording fees, document recording fees and one-half of closing fees charged by the closing agent. City as Seller shall be responsible for payment of any State transfer fee, the one half of closing fees charged by the closing agent.

33. Early Termination.

This Agreement shall become null and void upon either of the following occurrences:

- a. Mutual consent of both parties.
- b. Expiration of the due diligence period with a determination the project will not proceed.

This Agreement shall also terminate upon ALL of the following conditions:

- a. The City has been paid a minimum of \$1.6 million in aggregate for the property and any net sale proceeds to be divided and paid pursuant to Section 16.
- b. All portions of the property have been transferred to the Developer or Developer's agents, tenants, subsequent owners, or eventual end-users.
- c. Any subsequent supplemental development agreements executed as contemplated in Section 6 have been fulfilled to the satisfaction of both parties.
- d. Any obligation of the parties not completed shall survive the termination of this Agreement.

34. Financial Assurances.

Prior to execution of this Agreement, Developer shall provide information satisfactory to the City and the City's Financial Advisor that the Developer has secured financing or other capital means sufficient to adequately finance the project and fulfill the obligations of this Agreement. A letter attesting such from a lender(s) or other financial institution shall satisfy this provision. The City and its Financial Advisor agree to consider such information as proprietary and confidential. Prior to the transfer of title from City to Developer, Developer shall enter into a supplemental Development Agreement as contemplated in Section 6 with

the City and provide financial assurances, acceptable to the City, to guarantee completion of the Project. During the course of the Due Diligence period pursuant to Section 4, Developer agrees to use its best efforts to determine the financial capacity of subsequent purchasers, builders, contractors, retailers, lessors and other parties associated with end-use development to meet such obligations.

35. Notices.

Any notices required of this Agreement shall be made in writing and shall be hand-delivered or sent by United States Certified Mail, postage prepaid, and shall be effective when hand-delivered or deposited as aforesaid and addressed to the respective parties at the addresses below:

City as Seller: Jeffrey W. Weldon
City Manager
City of Brookings
520 Third Street
Brookings, SD 57006

Developer as Buyer: Michael S. Bender
Brookings Marketplace, LLC
Bender Companies, Inc.
122 Phillips Avenue; Suite 350
Sioux Falls, SD 57104

36. Effective Date and Term of this Agreement. The effective date of this Agreement shall be the date of execution by the last of the Parties to execute this Agreement. The term of this Agreement shall commence upon the effective date and shall extend for a period of Twenty (20) years thereafter, unless said Term is terminated, modified or extended by circumstances set forth in this Agreement or by mutual consent of the Parties. Following the expiration of said Term, this Agreement shall be deemed terminated and of no further force and effect.

37. Binding effect.

All provisions of this Agreement are hereby made binding upon personal representatives, heirs, successors, and assigns of all parties hereto.

38. Law Governing.

This Agreement shall be construed under and in accordance with the laws of the State of South Dakota.

39. Entire Agreement.

This Agreement constitutes the entire Agreement between the City and Developer and there are no other covenants, agreements, promises, terms, provisions, conditions, undertakings or understanding, either oral or written, between them concerning the property, other than those herein and set forth. No subsequent Agreement, or any amendments thereto, shall be binding upon City as Seller or Developer as Buyer unless it is in writing and signed by both parties.

IN WITNESS THERETO, the parties hereto have executed this Agreement as of the date so stipulated.

CITY:

CITY OF BROOKINGS, SOUTH DAKOTA

By: Tim Reed
Its Mayor, Tim Reed
Attest: Shari Thornes
Its City Clerk, Shari Thornes

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF BROOKINGS)

The foregoing instrument was acknowledged before me this 14th day of December, 2016, by Tim Reed, the Mayor and Shari Thornes, the City Clerk of the City of Brookings, a municipal corporation under the laws of South Dakota, on behalf of said public corporation.

Donna Foster
Notary Public 3-11-2022

DEVELOPER:

BROOKINGS MARKETPLACE, LLC

By: Michael Bender
Its Principle Partner

STATE OF SOUTH DAKOTA)
) ss.
COUNTY OF Minnehaha)

The forgoing instrument was acknowledged before me this 15th day of December, 2016, by Michael Bender, the Principle Partner of Brookings Marketplace, LLC, on behalf of the limited liability company.

Summer Hoffman 8/25/21

This document was drafted and approved to form by _____

