

Date September 14, 2020

RESOLUTION APPROVING FIRST AMENDMENT TO DEVELOPMENT AGREEMENT WITH SWAPS CASH, LLC (LINCOLN AND LISA MCILRAVY) FOR THE CONSTRUCTION OF A NEW 6-STORY, 112 ROOM ELEMENT HOTEL PROJECT LOCATED AT 304 EAST WALNUT STREET

WHEREAS, on April 8, 2019, by Roll Call No. 19-0557, the City Council approved preliminary terms of agreement with Swaps Cash, LLC, represented by Lincoln and Lisa McIlravy, Members, (“Developer”), for construction of a new 6-story, 112 room Element Hotel on a vacant half block site at 304 E. Walnut Street, also known as 333 East 3rd Street, which is expected to include at least 2,000 square feet of ground level commercial retail space for lease on East Walnut Street and approximately 63 parking stalls within a second floor covered ramp and the use of at least 32 leased stalls within the existing parking ramp located at 240 East Walnut Street (collectively the “Improvements” or “Project”), at an estimated total project cost of \$21,500,000, subject to receipt of the financial assistance identified below; and

WHEREAS, pursuant to Roll Call No. 19-0557, the City Council directed the City Manager to proceed with negotiation of a development agreement with Developer for said Project; and

WHEREAS, on August 19, 2019, by Roll Call No. 19-1347, the City Council approved an Urban Renewal Development Agreement (the “Development Agreement”) with the Developer, whereby the Developer has agreed to construct the Project, in accordance with a City-approved site plan and the Conceptual Development Plan, in exchange for project-generated tax increment financing (TIF) assistance from the City; and

WHEREAS, the Development Agreement currently provides that the Developer was required to commence construction of the project no later than December 31, 2019, with substantial completion of the Improvements by December 31, 2021, and with economic development (TIF) assistance to be provided thereafter; and

WHEREAS, the Developer has been unable to commence or complete construction of the Improvements in accordance with said deadlines due to circumstances related to project changes necessary to meet the construction budget and has asked for an extension of said deadlines, which also requires a delay to provision of economic development (TIF) assistance; and

WHEREAS, City Economic Development staff and the Developer have negotiated terms of a First Amendment to the Development Agreement and Restated Declaration of Covenants, on file in the office of the City Clerk, extending the deadlines for Developer to commence and complete construction of the Improvements from December 31, 2019 and December 31, 2021 to July 31, 2021 and December 31, 2023, respectively.

NOW, THEREFORE, BE IT RESOLVED by the City Council of the City of Des Moines, Iowa, that:



Roll Call Number

Agenda Item Number

45

Date September 14, 2020

1. The First Amendment to the Urban Renewal Development Agreement by and between the City and Swaps Cash, LLC, is hereby approved, and the Mayor is authorized and directed to execute said documents on behalf of the City of Des Moines and the City Clerk to attest to his signature.
2. The City Manager and his designees are hereby authorized and directed to administer the Agreement on behalf of the City and to monitor compliance by Swaps Cash, LLC with the terms and conditions of the Agreement, as amended. The City Manager is further directed to forward to City Council all matters and documents that require further City Council review and approval in accordance with the Agreement, as amended.

(Council Comm. No. 20-409)

MOVED BY _____ TO ADOPT.

APPROVED AS TO FORM:

/s/ Glenna K. Frank

Glenna K. Frank, Assistant City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
BOESEN				
GATTO				
GRAY				
MANDELBAUM				
VOSS				
WESTERGAARD				
TOTAL				

MOTION CARRIED

APPROVED

Mayor

CERTIFICATE

I, P. KAY CMELIK, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

City Clerk

**FIRST AMENDMENT TO URBAN RENEWAL DEVELOPMENT AGREEMENT BY
AND BETWEEN CITY OF DES MOINES, IOWA AND SWAPS CASH, LLC
(METRO CENTER URBAN RENEWAL PROJECT)**

THIS FIRST AMENDMENT to Urban Renewal Development Agreement by and between City of Des Moines, Iowa and Swaps Cash, LLC (Metro Center Urban Renewal Project) (hereinafter "First Amendment") is entered into this _____ day of _____, 2020, by and between the City of Des Moines, Iowa ("City") and Swaps Cash, LLC ("Developer").

It is agreed by and between City and the Developer that:

1. The above-referenced Urban Renewal Development Agreement (herein referred to as "Agreement"), as authorized by the Des Moines City Council on August 19, 2019, by Roll Call No. 19-1347, and recorded with the Polk County Recorder in Book 17487, Page 524, is hereby amended in accordance with the terms set forth in this First Amendment.

2. Section 1.2, "Time for Completion of Improvements", with the exception of footnote 1 thereto which remains as stated, is hereby deleted in its entirety and replaced with the following:

Sec. 1.2. Time for Completion of Improvements. Subject to Section 5.4 of this Agreement, Developer shall cause construction of the Improvements to be commenced no sooner than September 23, 2019, but no later than July 31, 2021, and shall cause such construction to be diligently pursued to completion. Commencement of construction shall be demonstrated by Developer commencing work on the Improvements under authority of a building permit. Subject to Sections 5.2 and 5.4 of this Agreement, the Improvements shall be substantially completed by December 31, 2023, so as to qualify for the issuance of the Certificate of Completion under Section 2.4 of this Agreement.¹

3. Section 3.1, "Duration", is hereby deleted in its entirety and replaced with the following:

Sec. 3.1. Duration. The Urban Renewal Covenants imposed pursuant to this article shall apply to the Property and shall run with the land upon which the Property is located for a term (the "Restricted Term") commencing upon the Effective Date and continuing until the earlier of May 1, 2036 or payment of the final installment of the City Grant to Developer pursuant to Article 4 below, unless earlier terminated in accordance with, or otherwise limited by, this Agreement, including, without limitation, pursuant to Section 4.6(D) of this Agreement.²

[FN2] ² See Section 4.3 and footnote to Section 4.3(A). Final installment on City Grant expected to be due on May 1, 2036.

4. Section 4.3, "Economic Development Grant", excluding footnotes 4 and 5 thereto which remain as stated, is hereby deleted in its entirety and replaced with the following:

Sec. 4.3. Economic Development Grant. A. Subject to Sections 4.4, 4.5 and 4.6 of this Agreement, City shall pay to Developer an Economic Development Grant (the "City Grant") payable in semi-annual installments each November 1st and May 1st, or the first business day thereafter, commencing November 1, 2025. Each of the two installments on the City Grant due in fiscal years 1-5 shall be in an amount equal to one-half of eighty-five percent (85%) of the Project TIF, and each of the two installments on the City Grant due in years 6-10 shall be in an amount equal to one-half of eight percent (80%) of the Project TIF, as defined below. Said installment payments shall continue to be paid by City to Developer until the earlier of (1) such time as the City Grant paid by City to Developer equals \$2,000,000.00, calculated on a net present value (NPV) basis³, or (2) ten years after the date of the first semi-annual installment payment, whether or not the City Grant paid by City to Developer equals or is less than \$2,000,000.00. The total amount of all installments of the City Grant paid by City to Developer shall not exceed \$2,000,000.00, calculated on a net present value (NPV) basis⁴, and the total number of all installments paid by City to Developer shall not exceed 20 regardless of amount of the City Grant paid.⁵

[FN 3] ³ Net present value is calculated by using an interest rate of 4.5 percent (4.5%). The expected timing of the installments on the City Grant is based upon the following schedule:

CY2023	Improvements completed
1-1-2024	Improvements first assessed at completed value
FY2024/25	Taxes first accrue on completed value
FY2025/26	Taxes first payable on completed value
11-1-2025	First installment due on City Grant
5-1-2036	Anticipated 20th and final installment on City Grant, unless the total City Grant amount of \$2,000,000.00 has been reached prior to said date.

5. Section 4.7, "Reporting", is hereby deleted in its entirety and replaced with the following:

Sec. 4.7. Reporting. Commencing on October 1, 2025, and continuing annually thereafter until all installments on the City Grant have been paid, Developer shall cause an Annual Report to be prepared and delivered to the City on or before each November 1 containing the following:

6. Section 5.2, "Special Remedies", is hereby deleted in its entirety and replaced with the following:


Sec. 5.2. Special Remedies. A. In the event Developer does not timely complete the Improvements as required by Section 1.2, but the Improvements are substantially completed and qualify for issuance of the Certificate of Completion by June 30, 2024, it shall not constitute a default under this Agreement and the sole remedy shall be the

reduction in the amount of the first two installments on the Economic Development Grant resulting from the assessed value of the incomplete building on January 1, 2024.

7. All other terms, provisions, and conditions originally set forth in the Agreement, including all exhibits thereto, remain effective and binding upon City and the Developer.

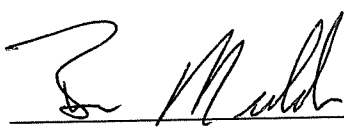
IN WITNESS WHEREOF, the parties hereto have executed this First Amendment to the Urban
Renewal Development Agreement as of the _____ day of
_____, 2020.

SWAPS CASH, LLC
An Iowa Limited Liability Company

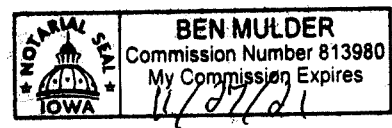

By: Lincoln McDermott
Its: manager

STATE OF IOWA)
) ss:
COUNTY OF POLK)

This instrument was acknowledged before me on September 9th 2020, by
_____, as _____ of Swaps Cash, LLC, on behalf
of whom the instrument was executed.



Notary Public in and for the State of Iowa
My Commission Expires: 11/27/21



CITY OF DES MOINES, IOWA

ATTEST:

By: _____
P. Kay Cmelik, City Clerk

By: _____
T.M. Franklin Cownie, Mayor

APPROVED AS TO FORM:

/s/ Glenna K. Frank
Glenna K. Frank
Assistant City Attorney

STATE OF IOWA)
) ss:
COUNTY OF POLK)

On this ___ day of _____, 2020, before me, the undersigned, a Notary Public in the State of Iowa, personally appeared T.M. FRANKLIN COWNIE and P. KAY CMELIK, to me personally known, and who, being by me duly sworn did state that they are the Mayor and City Clerk, respectively, of City of Des Moines, Iowa, a municipal corporation; that the seal affixed to the foregoing instrument is the corporate seal of the corporation; that the instrument was signed on behalf of City of Des Moines, Iowa, by authority of its City Council, as contained in the Resolution adopted by City Council under Roll Call No. 20-_____ of City Council on the ___ day of _____, 2020, and that T.M. FRANKLIN COWNIE and P. KAY CMELIK acknowledged the execution of the instrument to be the voluntary act and deed of City of Des Moines, Iowa, by it and by them voluntarily executed.

Notary Public in the State of Iowa

Exhibit B
To Development Agreement

Prepared by: Glenna K. Frank, Assistant City Attorney, 400 Robert D. Ray Drive, Des Moines, IA 50309 515/283-4130
Return Address: City Clerk - City Hall, 400 Robert D. Ray Drive, Des Moines, IA 50309
Taxpayer: No change
Title of Document: Development Agreement
Grantor's Name: Swaps Cash, LLC
Grantee's Name: City of Des Moines, Iowa
Legal Description: The Property is locally known as 333 East 3rd Street, also known as 304 East Walnut Street, and is more specifically described as follows:

LOT TWO (2) IN BLOCK ONE (1) IN SCOTT & DEAN'S ADDITION TO FORT DES MOINES, NOW INCLUDED IN AND FORMING A PART OF THE CITY OF DES MOINES, POLK COUNTY, IOWA; and,

ALL OF THE VACATED EAST-WEST ALLEY RIGHT OF WAY LYING NORTH OF AND ADJOINING LOTS 1 THROUGH 6, STEWART AND HUEGLES SUBDIVISION, AN OFFICIAL PLAT, ALL NOW INCLUDED IN AND FORMING A PART OF THE CITY OF DES MOINES, POLK COUNTY, IOWA, AND CONTAINING APPROXIMATELY 1,056 SQUARE FEET; and,

LOTS ONE (1), TWO (2), THREE (3), FOUR (4), FIVE (5), AND SIX (6) IN STEWART & HUEGLE'S SUBDIVISION OF LOT 1, BLOCK 1, IN SCOTT & DEAN'S ADDITION TO FORT DES MOINES, NOW INCLUDED IN AND FORMING A PART OF THE CITY OF DES MOINES, POLK COUNTY, IOWA.
(Herein "Property")

RESTATED
DECLARATION OF COVENANTS

SWAPS CASH, LLC, an Iowa limited liability company (hereinafter "Developer"), in consideration of the mutual obligations undertaken by Developer and the **City of Des Moines, Iowa**, a municipal corporation (hereinafter "City"), in the **Development Agreement** dated as of August 19, 2019 (hereinafter the "Agreement"), does hereby CONVEY unto the said City the beneficiary interest of the covenants set forth below, in and to the real estate in the City of Des

Moines, Polk County, Iowa, identified as the Property in said Agreement, and more specifically described above.

Sec. 1. Agreement / Conceptual Development Plan. The Agreement is recorded in Book 17487, Page 524-542, and First Amendment thereto in Book _____, Page _____, in the office of the Polk County Recorder and available for public inspection in the office of the City Clerk, at City Hall, 400 Robert D. Ray Drive, Des Moines, Iowa. This Restated Declaration of Covenants is executed and filed by Developer in performance of its obligations under Article 3 of the Agreement. All references herein to the approved Conceptual Development Plan are intended to refer to the Conceptual Development Plan attached as Exhibit "A" to the Agreement as the same may be amended from time to time by Developer in accordance with the terms of the Agreement.

Sec. 2. Duration. The Property shall be subject to the covenants set forth herein for a term (the "Restricted Term") commencing upon the recording of this Declaration of Covenants and continuing until the earlier of May 1, 2036 or the date of payment of the final installment of the City Grant to Developer pursuant to Article 4 of the Agreement if other than May 1, 2036 or the recording of a Termination Certificate by City which certifies that Developer has satisfied all of its obligations under the Agreement or that the Agreement has otherwise terminated, or the termination of the Agreement by Developer as provided for in Section 6.7 of the Agreement. However, such obligations and covenants shall be binding on the Developer itself, each successor in interest to the Property and any improvements thereon, and every part thereof, and each party in possession or occupancy, respectively, only for such period as such successor or party shall have title to, or an interest in, or possession or occupancy of, the Property or any improvements thereon or part thereof.

Sec. 3. Covenants. During the Restricted Term, the Property and each portion thereof shall be subject to the following covenants, limitations and restrictions regarding its future use and development (herein referred to as the "Covenants"):

1. Development. Developer shall undertake the development of the Property by constructing the Improvements thereon in accordance with the terms of the Agreement, including the approved Conceptual Development Plan, and any City-approved Site Plan, and all applicable State and City permits, laws, and regulations, and including but not limited to the following:
 - A. The construction of a 6-story Element Hotel containing the following elements:
 - i. At least 112 guest rooms.
 - ii. At least 2,000 square feet of commercial space on the ground floor, facing East Walnut Street, suitable for lease for retail occupancy.
 - iii. Approximately 63 parking stalls within a second-floor covered ramp and the use of at least 32 stalls within the existing parking ramp located at 240 East Walnut Street.

- iv. A ground level lobby and elevators, amenities and common areas customary for a business hotel, including but not limited to a swimming pool, indoor fitness center, a hotel restaurant/lounge area, and rooftop outdoor seating area.
 - v. Design and materials commensurate with those used in surrounding developments, including two color tones of brick, stone veneer, full-height glass at the first floor to tie into the retail storefront area, and the signature architectural entry of the Element Hotel brand along East 3rd Street, with attention given to seamlessly blend the above-ground parking level with the remainder of the architecture of the building.
 - vi. The building shall be constructed of a concrete podium on levels 1 and 2, with structural steel or light gauge steel framing for floors 3 through 6.
 - vii. Compliance with Mid-American Energy's Commercial New Construction program.
2. Property Use. The Improvements shall be devoted, maintained and used for hotel, commercial, and retail, purposes, as required by the Agreement and in conformity with and in the proportions shown by the approved Conceptual Development Plan. Such use includes, but it not limited to:
 - A. A minimum of 2,000 square feet on the ground floor of the building on the Property, facing East Walnut Street, shall be dedicated to commercial retail uses.
3. Prohibition Against Discrimination in Sale or Leasing. Developer, its successors and assigns shall not knowingly discriminate against or segregate any person or group of persons on account of age, race, religion, creed, color, sex, sexual orientation, gender identity, national origin, ancestry, disability, familial status, or source of income as defined in Des Moines Municipal Code Chapter 62, in the sale, leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the Property or the Improvements erected thereon, and not establish or permit any such practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, sublessees, sub-tenants or vendees in the Property or the Improvements erected thereon.
4. Prohibition Against Discrimination in Employment. In the employment of persons upon the Property, Developer, its successors and assigns shall comply with all federal, State of Iowa and local laws prohibiting discrimination.
5. Maintenance. The Improvements constructed upon the Property pursuant to the Agreement shall be maintained in good condition and repair in substantial conformance with the approved Conceptual Development Plan and Construction Plans. See Section 5.2 of the Agreement for special remedy for noncompliance with this covenant.

6. Fire and Extended Coverage Insurance. Developer shall keep in force fire and extended coverage insurance upon the Improvements with insurance underwriters authorized to do business in the State of Iowa and reasonably satisfactory to City. Such insurance shall be in an amount equal to the replacement cost of the Improvements, excluding cost of foundations, underground pipes, wiring and outside paving, and excluding the cost of any fixtures and contents under the ownership and control of any tenants. If requested by the City, Developer shall deliver to the City a current certificate of insurance that clearly discloses on its face coverage in conformity with all the foregoing requirements and a certified copy of the policy. In the event of destruction of the Improvements or any part thereof, said insurance and all monies payable by reason of such insurance or destruction to Developer shall be held in trust by Developer, and shall be used by Developer exclusively for the purpose of: (i) repairing the Improvements and restoring the same to their former condition and use; (ii) replacing the Improvements, with equivalent or more suitable improvements in substantial conformance with the approved Conceptual Development Plan, as amended in accordance with this Agreement; or (iii) payment of loans used to finance or refinance the construction of the Improvements or other improvements to the Property, if required by the lender.

7. Situs for Taxation and Payment. No portion of the Property shall be used for any use that would cause the Property to be reclassified for property tax purposes as other than commercial property. Developer shall pay when due all taxes and assessments, general or special, levied upon or assessed against any part of the Property. Developer, its successors and assigns, and every successor in interest to the Property and the Improvements thereon, or any part thereof, shall not cause or voluntarily permit any part of the Property and the Improvements thereon:
 - A. To be owned by a telephone utility or any other entity of a type where the assessed value of taxable property of such entity is not treated as located within the City of Des Moines in its entirety, or apply for a deferral of property tax on the Property pursuant to any present or future statute or ordinance; or
 - B. To be owned or leased by any entity that can qualify for property tax exemption under Iowa Code Chapter 427, and shall not apply for, seek or voluntarily allow, the classification of any portion of the Property as exempt from taxation.

Sec. 4. Required Terms in any Conveyance. During the Restricted Term, Developer shall endeavor to include in every deed, lease, sublease and other instrument conveying all or any part of Developer's interest in any portion of the Property, a provision identifying the terms, conditions, restrictions and requirements of this Declaration and acknowledging that the City may enforce the terms, conditions, restrictions and requirements of this Declaration against Developer's successors and assigns to the same extent as against Developer. Developer shall cooperate in good faith in the City's enforcement of the requirements of this Declaration of Covenants against Developer's successors and assigns to any interest in the Property.

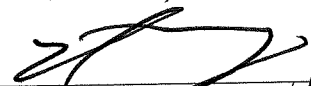
Sec. 5. Covenants; Binding Upon Successors in Interest. It is intended that the terms of this Declaration of Covenants shall be covenants running with the land and that they shall, in any event, and without regard to technical classification or designation, legal or otherwise, and except only as otherwise specifically provided in the Agreement, be binding, only to the extent permitted by law and equity, for the benefit and in favor of, and enforceable by, the City, its successors and assigns, against Developer, its successors and assigns and every successor in interest to any portion of the Property and the Improvements erected thereon, or any part thereof or any interest therein, and any party in possession or occupancy of any of such Property, or any part thereof.

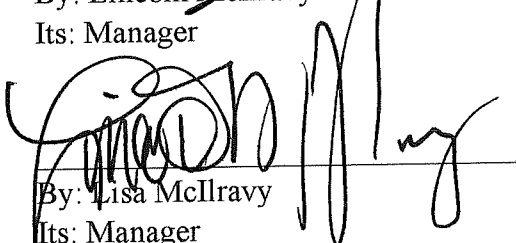
Sec. 6. City's Rights To Enforce. In amplification, and not in restriction of, the provisions of the preceding section, it is intended and agreed that the City and its successors and assigns shall be deemed beneficiaries of the agreements and covenants provided in this Declaration of Covenants, both for and in its own right and also for the purposes of protecting the interests of the community and other parties, public or private, in whose favor or for whose benefit such agreements and covenants have been provided. Such agreements and covenants shall run in favor of the City without regard to whether the City has at any time been, remains, or is an owner of any land or interest therein to or in favor of which such agreements and covenants relate. The City shall have the right, in the event of any breach of any such agreement or covenant, to exercise all the rights and remedies, and to maintain any actions or suits at law or in equity or other proper proceedings to enforce the curing of such breach of agreement or covenant, to which it or any other beneficiaries of such agreement or covenant may be entitled.

Sec. 7. Warranty of Title. Developer does hereby covenant with City that Developer holds legal and equitable title to the Property.

SIGNED this 8th day of September, 2020.

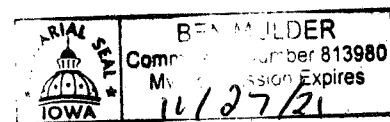
SWAPS CASH, LLC


By: Lincoln McClravy
Its: Manager

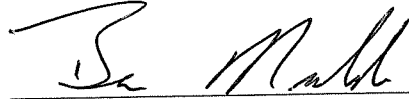

By: Lisa McClravy
Its: Manager

STATE OF Iowa)
)
COUNTY OF Johnson)

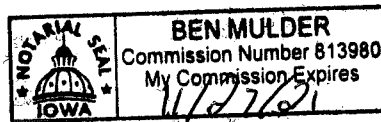
SS:



This instrument was acknowledged before me on Sept. 9th, 2020, by **Lincoln McIlravy** and **Lisa McIlravy**, as the Managers of **Swaps Cash, LLC**, an Iowa limited liability company, on behalf of whom the instrument was executed.



Notary Public in the state identified above
My commission expires: 11/27/21



ACCEPTANCE:

I, P. Kay Cmelik, City Clerk of the City of Des Moines, Iowa, do hereby certify that the within and foregoing Declaration of Covenants was duly approved and accepted by the City Council of said City of Des Moines by Resolution and Roll Call No. 20-_____, passed on the _____ day of _____, 2020, and this certificate is made pursuant to authority contained in said Resolution.

Signed this _____ day of _____, 2020.

P. Kay Cmelik, City Clerk of the City of Des Moines, Iowa