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**Date** September 14, 2020

**RESOLUTION APPROVING TERMS OF AN URBAN RENEWAL DEVELOPMENT AGREEMENT WITH AUST REAL ESTATE, LLC FOR THE HISTORIC RENOVATION OF THE FERRINGTON PLACE BUILDING LOCATED AT 1201 KEOSAUQUA WAY FOR A MIXED-USE DEVELOPMENT**

WHEREAS, on December 16, 2019 in Roll Call number 19-2019, The City Council approved a resolution authorizing the City Manager to negotiate an agreement with Aust Real Estate, LLC, (Matt and Mindy Aust, Owners, 1031 7<sup>th</sup> Street, West Des Moines, IA 50265) ("Developer") for the historic restoration of the currently vacant 2-story, 18,912 square-foot building at 1201 Keosauqua Way, known as Ferrington Place, to include first and second floor office and/or retail space; and,

WHEREAS, the City Manager has negotiated an Urban Renewal Development Agreement (the "Agreement") with the Developer to restore the building as authorized; and,

WHEREAS, the proposed Agreement and Conceptual Development Plan are on file and available for inspection in the office of the City Clerk; and,

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

1. The City Council hereby makes the following findings in support of the proposed Agreement with the Developer:
  - a) The Developer's obligations to construct the Improvements as provided by the Agreement furthers the objectives of the Urban Renewal Plan to provide additional housing, employment opportunities and tax base in the Metro Center Urban Renewal Project Area, and to preserve and create an environment which will protect the health, safety and general welfare of City residents.
  - b) The economic development incentives for the creation of the employment opportunities and development of the Improvements are provided by the City to Developer pursuant to the Urban Renewal Law and Chapter 15A of the Code of Iowa, and Developer's obligations under this Agreement to construct the Improvements will generate the following public gains and benefits: (i) it will advance the improvement and redevelopment of the Metro Center Urban Renewal Area in accordance with the Urban Renewal Plan; (ii) it will encourage further private investment to reverse the pattern of disinvestment and declining property values in the surrounding area; and, (iii) it will further the City's efforts to retain and create job opportunities within the Urban Renewal Area which might otherwise be lost.



Date September 14, 2020

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- c) The construction of the Improvements is a speculative venture and the construction and resulting benefits would not occur without the economic incentives provided by this Agreement.
- d) The City Council believes that the redevelopment of the Property pursuant to the Agreement, and the fulfillment generally of the Agreement, are in the vital and best interests of City and the health, safety, morals, and welfare of its residents, and in accord with the public purposes and provisions of the applicable state and local laws and requirements under which the project has been undertaken, and warrant the provision of the economic assistance set forth in the Agreement.
2. The Conceptual Development Plan for the project, which is contained in the Agreement, is hereby approved.
3. The Urban Renewal Development Agreement between the City and Aust Real Estate, LLC, is hereby approved. The Mayor and City Clerk are hereby authorized and directed to execute the Agreement on behalf of the City of Des Moines.
4. The Economic Development Director or the Directors designee is directed to submit a copy of the fully executed Development Agreement to the Finance Department to enable the Finance Director to make any appropriate disclosure filings in accordance with the City's adopted revised Disclosure Policy.
5. Upon requisition by the City Manager or the City Manager's designee, the Finance Department shall advance the installments on the Economic Development Grant pursuant to Article 4 of the Agreement.
6. The City Manager or his designees are hereby authorized and directed to administer the Urban Renewal Development Agreement on behalf of the City, including the filing of the Agreement, and to monitor compliance by the Developer with the terms and conditions of the Agreement. The City Manager is further directed to forward to City Council all matters and documents that require City Council review and approval in accordance with the Agreement.



**Roll Call Number**

**Agenda Item Number**

46

**Date** September 14, 2020

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(Council Communication No. 20- **388** )

MOVED by \_\_\_\_\_ to adopt.

FORM APPROVED:

/s/ Thomas G. Fisher Jr.

Thomas G. Fisher Jr.  
Assistant City Attorney

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

MOTION CARRIED APPROVED

**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.

\_\_\_\_\_  
Mayor

\_\_\_\_\_  
City Clerk

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Prepared by/Return to: Thomas G. Fisher Jr., Assistant City Attorney, 400 Robert D. Ray Drive  
Des Moines, IA 50309 (515) 283-4547

Taxpayer: \_\_\_\_\_  
Grantors' Names: \_\_\_\_\_  
Grantee's Name: City of Des Moines, Iowa  
Legal Description: Shown on Page \_\_, Exhibit A

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**URBAN RENEWAL DEVELOPMENT AGREEMENT**  
**(This Agreement includes restrictive covenants in Article 3)**

**Metro Center Urban Renewal Project Between:**  
**CITY OF DES MOINES, IOWA**  
**and**  
**AUST REAL ESTATE, LLC**

Approved by City Council:  
Date: \_\_\_\_\_, 2020  
Roll Call No. 20-\_\_\_\_\_

Exhibits:

Exhibit A: Legal Description of Property  
Exhibit B: Conceptual Design

**Recording note:** This Agreement will be recorded without Exhibit B attached. The entire Agreement including Exhibit B will be on file and available for inspection in the office of the City Clerk of Des Moines, Iowa.



## URBAN RENEWAL DEVELOPMENT AGREEMENT

This **URBAN RENEWAL DEVELOPMENT AGREEMENT**, including Exhibits A and B, attached hereto and by this reference made a part hereof (the Agreement and Exhibit are together hereinafter called the "Agreement"), is made as of \_\_\_\_\_, 2020 (the "Effective Date"), by and between the **CITY OF DES MOINES, IOWA**, a municipal corporation (the "City"), acting pursuant to Chapter 403 of the Code of Iowa, (the "Urban Renewal Law"), and **AUST REAL ESTATE, LLC** an Iowa limited liability company (the "Developer").

WHEREAS, in furtherance of the objectives of the Urban Renewal Law, City has undertaken a program for the clearance and reconstruction or rehabilitation of slum and blighted areas in the City, specifically to stimulate economic revitalization of the downtown area; to make use of under-utilized areas of the City of Des Moines; to remove conditions which have prevented normal development of the land by private enterprise; and to avoid stagnant and unproductive conditions of land which is potentially useful and viable for contributing to the public health, safety and welfare and in this connection is engaged in carrying out an urban renewal project known as the Metro Center Urban Renewal Project (hereinafter called "Project") in an area (hereinafter called "Project Area") located in the City of Des Moines; and,

WHEREAS, as of the date of this Agreement there has been prepared and approved by City a plan for the Project, consisting of the Urban Renewal Plan and amendments thereto indicated in the following table, all of which have been recorded among the land records in the Office of the Recorder for Polk County, Iowa, as indicated in the following table:

<u>Action</u>	<u>Date Adopted</u>	<u>Roll Call</u>	<u>Book-Page</u>
Plan Adopted	03/20/00	00-0788 & 00-0789	8491-645 8491-721
1st Amendment	06/26/00	00-1927	8534-168
2nd Amendment	11/06/00	00-4270	8637-725
3rd Amendment	12/04/00	00-4536	8659-119
4th Amendment	12/20/00	00-4679	8670-933
5th Amendment	10/22/01	01-3224	9055-830
6th Amendment	06/17/02	02-1596	9200-189
7th Amendment	07/28/03	03-1800	10072-230
8th Amendment	05/21/07	07-1015	12221-129
9th Amendment	12/22/08	08-2228	12871-414
10th Amendment	04/11/11	11-0628	13829-278
11th Amendment	12/17/12	12-1970	14592-565
12th Amendment	02/11/13	13-0239	14661-548
13th Amendment	06/24/13	13-1028	14856-232
14th Amendment	03/10/14	14-0437	15147-467
15th Amendment	08/25/14	14-1320	15328-362
16th Amendment	07/13/15	15-1173	15754-335
17th Amendment	11/23/15	15-1996	15827-665

18th Amendment	3/21/16	16-0514	15941-52
19th Amendment	1/23/17	17-0151	16365-602
20th Amendment	4/3/17	17-0620	16441-77
21st Amendment	10/9/17	17-1768	16690-332
22nd Amendment	4/9/18	18-0628	16887-787
23rd Amendment	10/22/18	18-1802	17127-41
24th Amendment	5/6/19	19-0752	17327-329
25th Amendment	11/4/19	19-1772	17585-235

(which plan, as so amended is hereinafter called the "Urban Renewal Plan"); and,

WHEREAS, the Developer owns the real estate located at 1201 Keosauqua Way specifically described in Exhibit A (the "Property"); and,

WHEREAS, the Property is located in a part of the Project Area characterized by underutilized and vacant land and a pattern of disinvestment; and,

WHEREAS, Developer has agreed to redevelop the Property by completing a historic restoration of the building located at 1201 Keosauqua Way (the "Building"), which would, following restoration contain 18,9112 square feet of office and retail space, and one upper story residential dwelling unit; and,

WHEREAS, the Developer's obligations under this Agreement to redevelop the Property for commercial uses furthers the objectives of the Urban Renewal Plan to preserve and create an environment which will protect the health, safety and general welfare of City residents, and maintain and expand taxable values and employment opportunities within the Urban Renewal Project Area; and,

WHEREAS, economic development incentives are provided by the City to Developer pursuant to the Urban Renewal Law and Chapter 15A of the Code of Iowa, and Developer's obligations under this Agreement to construct the Improvements (defined below) will generate the following public gains and benefits: (i) it will advance the improvement and redevelopment of the Project Area in accordance with the Urban Renewal Plan; (ii) it will establish conditions which attract further new investments and prevent the recurrence of blight and blighting conditions; and (iii) it will further the City's efforts to retain and create job opportunities within the Project Area which might otherwise be lost; and,

WHEREAS, the construction of the Improvements is a speculative venture and the construction and resulting benefits would not occur without the economic incentives and other City covenants provided by this Agreement; and,

WHEREAS, City believes that the redevelopment of the Property pursuant to this Agreement, and the fulfillment generally of this Agreement, are in the vital and best interests of City and the health, safety, morals, and welfare of its residents, and in accord with the public purposes and provisions of the applicable state and local laws and

requirements under which the Project has been undertaken, and warrant the provision of the economic assistance set forth in this Agreement.

NOW THEREFORE, in consideration of the premises and the mutual obligations of the parties hereto, each of them does hereby covenant and agree with the other as follows:

## **ARTICLE 1. CONSTRUCTION OF IMPROVEMENTS.**

### **Sec. 1.1. Duty to Construct Improvements.**

A. Developer, subject to the terms of this Agreement, shall undertake the following construction (the "Improvements") on the Property:

- a. Historic restoration of the 2-story 18,912 square-foot building at 1201 Keosauqua Way, to include first and second floor office and/or retail space, and one upper story residential dwelling unit in accordance with State Historic Preservation Office review and requirements.
- b. The developer shall exceed the applicable Energy Code requirements by seeking participation and approval of Mid-American Energy's Commercial New Construction program. The final program verification report shall be provided to the City prior to issuance of the initial financial assistance payment. The developer has enlisted the Weidt Group to provide an energy audit for the project.
- c. The developer shall construct inset parallel public parking areas along Croker and 12<sup>th</sup> Streets adjacent to the Property with curb bump-outs located at two of the three intersections as shown on Exhibit B.
- d. The developer shall remove the wooden utility pole in the 12<sup>th</sup> Street right-of-way located in the middle of the block and associated electrical lines will be relocated underground.
- e. Within five (5) years of the date of this Agreement, or at the time any development on the parking lot occurs on the real estate legally described below, Developer will improve the site by reconstructing the retaining wall along 12<sup>th</sup> street and constructing a buffer along 12<sup>th</sup> street that includes trees as required by City ordinance for a right of way and subject to reasonable approval of the City. The legal description for the parking lot is:

The West 80 feet of Lot 18 Block 1 in WHITE'S ADDITION, an Official Plat, now in and forming a part of the City of Des Moines, Polk County Iowa.

- B. The Improvements shall be constructed in substantial compliance with the approved Conceptual Development Plan attached hereto as Exhibit B and with such future amendments thereto as may be approved by City as provided in Article 2. The Improvements shall also comply with the terms of this Agreement and with all applicable State and local laws and regulations.

Sec. 1.2. Time for Completion of Improvements. Subject to Section 7.4 of this Agreement, Developer shall cause construction of the Improvements to be commenced May 31st, 2021 and shall cause such construction to be diligently pursued to completion. Subject to Sections 7.2 and 7.4 of this Agreement, the Improvements shall be substantially completed by June 30, 2022, so as to qualify for the issuance of the Certificate of Completion under Section 2.4 of this Agreement.

Sec. 1.3. Progress Reports. From commencement of construction until construction of the Improvements has been substantially completed, Developer shall make reports, in such detail and at such times as may reasonably be requested by City, as to the actual progress of Developer with respect to such construction.

Sec. 1.4. Access to Property. During construction of any of the Improvements and prior to expiration of the Urban Renewal Covenants, as defined in Article 3, Developer shall permit City's representatives access to the Improvements at all reasonable times which City reasonably deems necessary for the purposes of this Agreement, such access to be subject to advance notice of at least 24 hours and accompaniment by Developer or any agent of Developer. No compensation shall be payable, nor shall any charge be made in any form by any party for the access provided for in this section.

Sec. 1.5. Prohibition Against Transfer.

- A. Prior to issuance of the Certificate of Completion for the Improvements pursuant to Section 2.4, Developer shall not, without the prior written approval of City, which approval shall not be withheld or delayed if the requirements of Section 1.5(B)(2) below are satisfied and in no event shall be unreasonably withheld or delayed, make or create, or suffer to be made or created, any total or partial sale, assignment, conveyance, or lease, or any trust or power, or transfer of the Property, or any part thereof or any interest therein (each, a "Transfer"), or any agreement to Transfer, except (i) any Transfer to a lender for the purpose of or related to obtaining funds for the construction of the Improvements; (ii) leases made in the ordinary course of business; (iii) easements or other encumbrances necessary for the Improvements; and (iv) transfers to an Affiliate of Developer (each, a "Permitted Transfer"). For purposes of this Agreement, an "Affiliate of the Developer" means any person or entity directly or indirectly controlling, controlled by or under common control with Developer; any officer, director, manager, general partner, member or trustee of Developer; or any person or entity who is an officer, manager, director, general partner, member or trustee of



another Affiliate of Developer. While no approval is required for a Permitted Transfer, in cases of a Permitted Transfer under subsection (iv) hereof, Developer shall execute, along with the transferee Affiliate, an instrument substantially similar to the one contemplated under Section 1.5(B)(2), below, and record the same with the Polk County Recorder.

- B. City shall be entitled to require as a condition to any such approval, other than with respect to a Permitted Transfer, that:
1. Any proposed transferee shall have the qualifications and financial responsibility, determined by City in its sole discretion, necessary and adequate to fulfill the obligations undertaken in this Agreement by Developer (or, in the event the Transfer is of or relates to part of the Property, such obligations to the extent that they relate to such part);
  2. Any proposed transferee, by an instrument in writing satisfactory to City in its sole discretion and in form recordable among the land records, shall, for itself and its successors and assigns, and expressly for the benefit of City, expressly assume all of the obligations of Developer under this Agreement and agree to be subject to all the conditions and restrictions to which Developer is subject (or, in the event the Transfer is of or relates to part of the Property, such obligations, conditions, and restrictions to the extent that they relate to such part);
  3. All instruments and other legal documents involved in effecting Transfer be submitted to City for review prior to the Transfer unless the transfer is to an Affiliate of the Developer.
- C. In the absence of specific written agreement by City to the contrary, no such Transfer, other than a Permitted Transfer, shall be deemed to relieve Developer, or any other party bound in any way by this Agreement or otherwise with respect to the construction of the Improvements, from any of its obligations with respect thereto.

Sec. 1.6. Limitation Upon Encumbrance of Property.

- A. Prior to issuance of the Certificate of Completion pursuant to Section 2.4, Developer shall not engage in any transaction imposing any new encumbrance or lien upon the Property, or any part thereof, whether by express agreement or operation of law, or suffer any encumbrance or lien to attach to the Property, except as permitted under paragraph B, below.
- B. Liens and encumbrances may be imposed upon the Property, and any part thereof, only for the purpose of (i) constructing the Improvements and obtaining funds to complete the same; (ii) the payment of installments of property taxes and special assessments that are due, but not delinquent; (iii) leases made in the ordinary course of business; and (iv) easements or other encumbrances

necessary for the Improvements. Developer shall use its best efforts to cause to be included in any mortgage on the Property, a provision requiring that whenever the mortgagee shall deliver any notice or demand to Developer with respect to any breach or default by Developer in its obligations under such mortgage, the mortgagee shall at the same time forward a copy of such notice or demand to City at the address shown in Section 8.5(b) hereof.

- C. Developer shall not be required to remove any encumbrance or lien required to be removed under paragraph A, above, so long as Developer shall contest, in good faith and at its own cost and expense, the amount or validity thereof, in an appropriate manner or by appropriate proceedings which shall operate during the pendency thereof to prevent the collection of or other realization upon the encumbrance or lien so contested, and the sale, forfeiture, or loss of the Property or any part thereof to satisfy the same. Each such contest shall be promptly prosecuted to final conclusion (subject to the right of Developer to settle any such contest), and Developer shall, promptly after the final determination of such contest or settlement thereof, pay and discharge the amounts which shall be determined to be payable therein, together with all penalties, interest, costs and expenses thereon or in connection therewith. Developer shall give City prompt written notice of any such contest and of the outcome thereof.

## **ARTICLE 2. CONCEPTUAL DEVELOPMENT PLAN**

Sec. 2.1. Site Plan Review Pre-Application Conference. The parties acknowledge that a pre-application conference has already been held for the Improvements pursuant to the Site Plan Review process as required by City of Des Moines Municipal Code Section 82-207. The review required by the Site Plan Ordinance (Des Moines Municipal Code §82-206 to §82-219) is a separate review process from the review of the Conceptual Development Plan provided for in this Agreement. Approval of a plan or an amendment thereto pursuant to one does not constitute approval for purposes of the other.

### Sec. 2.2. Conceptual Development Plan.

- A. A Conceptual Development Plan for the Improvements will be submitted to the Urban Design Review Board for approval as stated in Article 1. Any amendment to the Conceptual Development Plan by Developer is subject to approval by the City in the manner hereafter required.
- B. All changes to the approved Conceptual Development Plan must be submitted by Developer to City and are subject to City approval, which approval shall not be unreasonably withheld or delayed. City shall endeavor to promptly review the Conceptual Development Plan and any amendments thereto within the applicable limits of the agenda deadlines and public notice requirements. If City rejects an amendment to the Conceptual Development Plan, in whole or in part, it will set forth in writing the reasons for such rejection. Any proposed change which is determined by the City Manager of City to be a minor or unsubstantial

change may be administratively approved in writing by the City Manager or by the Director of the Office of Economic Development.

- C. The Conceptual Development Plan as amended shall include a conceptual site plan, detailed building elevations for each building face, floor plans for each story, and a streetscape and signage plan for the Property, and otherwise satisfy the following criteria:
1. The Conceptual Development Plan must comply with the requirements of this Agreement and must satisfy the land use requirements of the Urban Renewal Plan.
  2. The Improvements must comply with the applicable site plan standards, including but not limited to the landscape standards, the site plan policies, and all applicable zoning and building codes.
  3. The durability, appearance and quality of the exterior materials must be substantially equivalent to, or better than, that provided by the Plan.
  4. The Plan must comply with the recommendations of the Urban Design Review Board as adopted or amended by the Director of the Office of Economic Development, unless such recommendations are waived or amended by City Council resolution.

Sec. 2.3. Building Permits/Construction Permits. All construction and construction plans submitted by Developer must comply with City zoning, site plan and building code requirements. In addition, Developer shall make certain that both the construction and the construction plans are in substantial compliance with the Conceptual Development Plan shown in Exhibit B of this Agreement, as may be amended pursuant to Section 8.8 from time to time. City may withhold approval of building permits if the Construction Plans do not substantially comply with the Conceptual Development Plan, as may be amended pursuant to Section 8.8. However, approval or issuance of building permit is not an acknowledgment that the construction and construction plans are in substantial compliance of the obligations of this Agreement or the Conceptual Development Plan. If there is any reason to question whether the construction or the construction plans substantially conform with the Conceptual Development Plan, Developer shall immediately contact the City of Des Moines Office of Economic Development.

Sec. 2.4. Certificates of Completion.

- A. Developer shall request a "Certificate of Completion" for the Improvements by notifying City in writing that it has completed the Improvements in substantial compliance with the approved Conceptual Development Plan and Construction Plans and furnishing City with an architect's certificate or reasonable equivalent to that effect.

- B. Promptly upon receipt of Developer's notification of completion of the Improvements, City shall inspect the Improvements. If City determines that Developer has completed the Improvements in substantial compliance with the provisions of this Agreement and the approved Conceptual Development Plan and Construction Plans, as may be amended in accordance with this Agreement, City shall issue a "Certificate of Completion." Issuance of the Certificate of Completion shall not be unreasonably withheld or delayed by City. If City determines that Developer has not completed the Improvements in substantial compliance with the provisions of this Agreement and the approved Conceptual Development Plan and Construction Plans, as may be amended in accordance with this Agreement, City shall, within thirty (30) days of receiving Developer's notification of completion, provide Developer with a written statement of the basis for City's determination which specifies the actions to be performed by Developer in order to obtain the Certificate of Completion.
  
- C. The determination by City regarding completion of the Improvements is independent of any determination by City regarding the issuance of an Occupancy Permit pursuant to the Building Code of City. The issuance of an Occupancy Permit for any portion of the Property shall not serve as a substitute for the Certificate of Completion referenced in this Section.

Sec. 2.5. Effect of Issuance.

- A. Upon issuance of the Certificate of Completion, the obligations and covenants contained in this Agreement with respect to the construction of the Improvements and the dates for the beginning and completion thereof, shall be satisfied and terminated. However, all other obligations and covenants contained in this Agreement shall remain in full force for the remaining Term of this Agreement (as defined in Section 8.7, below). Developer may utilize the Certificate of Completion only as evidence of compliance with or satisfaction of Developer's construction obligations under this Agreement.
  
- B. The Certificate of Completion shall be in recordable form to allow filing among the land records of the Polk County Recorder's Office.

### **ARTICLE 3. URBAN RENEWAL COVENANTS.**

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 date of recording of this Agreement and continuing until May 1, 2043 unless earlier terminated in accordance with, or otherwise limited by, this Agreement, including, without limitation, pursuant to Section 4.6(D) of this Agreement.

Sec. 3.2. 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 "Urban Renewal Covenants"):

- 1) *Prohibition Against Discrimination in Sale or Leasing*. Developer, its successors and assigns, shall not 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; or familial status or source of income as defined in Section 62-1 of the Des Moines Municipal Code in the sale, leasing, subleasing, transferring, use, occupancy, tenure or enjoyment of the Property or the Improvements pursuant to this Agreement, 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 pursuant to this Agreement.
- 2) *Prohibition Against Discrimination in Employment*. In the employment of persons upon the Property, Developer and its successors and assigns shall comply with all federal, State of Iowa and local laws prohibiting discrimination.
- 3) *Maintenance*. The Improvements constructed upon the Property pursuant to this Agreement shall be maintained in good condition and repair in substantial conformance with the approved Conceptual Development Plan, as amended in accordance with this Agreement. If the Improvements are materially damaged by fire or other casualty, repairs to restore the Improvements to their former condition in substantial conformance with the approved Conceptual Development Plan, as amended in accordance with this Agreement, shall be commenced within ninety (90) days and shall be diligently pursued to completion, subject, however, to Section 7.4 of this Agreement
- 4) *Fire, 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.

- 5) *Classification for Taxation.*
- (a) Developer, its successors and assigns, shall not cause or voluntarily permit any part of the Property or the Improvements to be owned by a telephone utility or any other entity of a type where the assessed value of the Property would not be treated as located within the Project Area in its entirety pursuant to any present or future statute or ordinance.
  - (b) Developer shall further not cause or voluntarily permit any part of the Property or the Improvements 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.
  - (c) 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.
- 6) *Payment of Taxes.* Developer shall pay when due all taxes and assessments, general or special, levied upon or assessed against any part of the Property.

Sec. 3.3. Covenants; Binding Upon Successors in Interest. It is intended that the Urban Renewal Covenants undertaken by Developer pursuant to this Agreement shall be covenants running with the land on which the Property is located until the expiration of the Restricted Term or their earlier termination in accordance with this Agreement 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 this Agreement, be binding for such period of time, 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 the Developer, and its successors and assigns and every successor in interest to any portion of the Property and the Improvements, or any part thereof or any interest therein, and any party in possession or occupancy of any of such Property or Improvements, or any part thereof.

Sec. 3.4. Required Terms in any Conveyance. During the Restricted Term, or until the earlier termination of the Urban Renewal Covenants, as provided in this Agreement, Developer shall endeavor to include in every deed, lease, sublease and other instrument conveying all or any part of Developer's ownership interest in any portion of the Property (exclusive of the leases of individual units in the regular course of business), a provision identifying the terms, conditions, restrictions and requirements of this article, and acknowledging that the City may enforce the terms, conditions, restrictions and requirements of this article against Developer's successors and assigns to the same extent as against the Developer. Developer shall cooperate in good faith in the City's enforcement of the requirements of this article against Developer's successors and assigns to any interest in the Property.

## **ARTICLE 4. ECONOMIC ASSISTANCE.**

Sec. 4.1. Consideration for Agreement.



- A. In consideration of Developer's obligation to construct the Improvements in accordance with this Agreement and in consideration of the economic development and employment opportunities that will be retained and created in and around the Project Area as a result of such undertaking, City shall cause to be provided the economic incentives identified in this Agreement.
- B. In consideration of the City's obligation to provide the economic incentives pursuant to this article, Developer shall construct the Improvements.

Sec. 4.2. Economic Development Grant.

- A. Subject to Sections 4.3, 4.4, 4.5 and 4.6 of this Agreement, City shall pay to Developer an Economic Development Grant (the "Development Grant") payable in forty (40) semi-annual installments each November 1<sup>st</sup> and May 1<sup>st</sup>, or the first business day thereafter, commencing November 1<sup>st</sup> of the calendar year following the year in which the Improvements are first assessed at completed value. The amount of each payment shall be the sum of Ninety percent (90%) of the Project TIF.<sup>1</sup>
- B. The "Project TIF" means the total amount of property tax revenues that would be generated in the preceding six (6) months by the Improvements, which is defined as the assessed value of the Building as determined by the Polk County Iowa Assessor's Office, by imposing the levies subject to division and allocation into the special fund pursuant to Iowa Code Section 403.19(2) on the incremental taxable value of the Building use in the calculation of the property taxes due and payable in that fiscal year, in excess of the base taxable valuation of \$1,000. Any commercial property tax credit and tax replacement funds provided by the State of Iowa shall be disregarded in the calculation of Project TIF. Any tax levy and taxes generated by a self-supported municipal improvement district shall be disregarded in the calculation of the Project TIF. *The proceeds of the Downtown Des Moines Self-Supported Municipal Improvement District tax levies are committed to funding the undertakings of such district and are not available for inclusion in the calculation of the Project TIF.*

Sec. 4.3. Conditions Precedent. City shall have no obligation to advance the first installment and any future installment on the Development Grant unless and until:

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<sup>1</sup> The expected timing of the installments on the Development Grant is based upon the following schedule:

CY2022	Improvements completed
1-1-2023	Improvements first assessed at completed value
FY2025	Taxes first payable on completed value
11-1-24	First Installment of Development Grant
5-1-44	Final Development Grant

- A. Developer, with respect to the first installment on the Development Grant only, has substantially completed the Improvements and has qualified for issuance of the Certificate of Completion pursuant to Section 2.4; and,
- B. Developer is not then in material breach of any of the Urban Renewal Covenants or other provisions of the Agreement, and any default has been cured within the period allowed by Section 7.1, as may be extend in accordance with Article 7.
- C. Developer continues to be in compliance with section 2.3 of this Agreement.

Sec. 4.4. Reporting.

- A. Commencing on November 1 of the first year the Developer is entitled to payments under the Economic Development Grant, and continuing on each November 1st thereafter until all installments on the Economic Development Grant have been paid, Developer shall cause an Annual Report to be prepared and delivered to the City containing the following:
  - 1) *Amount of taxes due.* A statement identifying the total amount of property taxes due and payable in that fiscal year upon the Property, and the portion thereof attributable to levies subject to allocation to the special fund pursuant to Iowa Code §403.19(2), as amended from time to time.
  - 2) *Calculation of installment.* The calculation of the amount of the semi-annual advancements on the Development Grant due from City to Developer in the current calendar year pursuant to this Article.
  - 3) *Verification.* A statement signed by the President, Chief Executive Officer, Treasurer, Secretary, Managing Member or Chairman of the Board of Directors of the reporting business, verifying that the information contained in the Annual Report is true and accurate.

Sec. 4.5. Source of Funding.

- A. The Development Grant shall be paid by City solely from the special fund financed by the division of revenue pursuant to Iowa Code Section 403.19(2) from taxes levied on the Project Area. The obligations of City under this Agreement shall not constitute a general obligation of the City.
- B. The City represents, warrants and agrees that for so long as Developer is not in default under this Agreement and the City is obligated to pay future installments on the Development Grant in accordance with the terms of this Agreement:

- 1) City shall not repeal the designation of the Property or any part thereof as being within an urban renewal area pursuant to Iowa Code Section 403.5.
- 2) City shall not repeal Ordinance No. 15,427 nor amend such ordinance in any manner that impairs the City's ability to pay the installments on the Development Grant as contemplated by this Agreement.
- 3) City will timely certify to Polk County the estimated amount of each installment on the Development Grant for payment from the special fund for the Project in accordance with Iowa Code Section 403.19(6).

Sec. 4.6. Non-appropriation.

- A. Notwithstanding anything in this Agreement to the contrary, the obligation of the City to pay any installment of the Development Grant shall be an obligation limited to currently budgeted funds, and not a general obligation or other indebtedness of the City or a pledge of its full faith and credit under the meaning of any constitutional or statutory debt limitation, and shall be subject in all respects to the right of non-appropriation reserved by the City Council as provided in this section. City may exercise its right of non-appropriation as to the amount of the installment to be paid during any fiscal year during the Term of this Agreement without causing a termination of this Agreement. The right of non-appropriation shall be exercised only by resolution affirmatively declaring the City's election to non-appropriate funds otherwise required to be paid to Developer in the next fiscal year under this Agreement.
- B. In the event the City Council of City elects to not appropriate sufficient funds in the budget for any future fiscal year for the payment in full of the installment on the Development Grant due and payable in that fiscal year, then the City shall have no further obligation to Developer for the payment of any portion of the installment due in the next fiscal year which cannot be paid with the funds then appropriated for that purpose.
- C. The right of non-appropriation reserved to the City in this section is intended by the parties, and shall be construed at all times, so as to ensure that the City's obligation to pay future installments on the Development Grant shall not constitute a legal indebtedness of the City within the meaning of any applicable constitutional or statutory debt limitation prior to the adoption of a budget which appropriates funds for the payment of that installment or amount. In the event that any of the provisions of this Agreement are determined by a court of competent jurisdiction to create, cause, or result in the creation of, such a legal indebtedness of the City, the application and enforcement of any such provision(s) shall be deemed suspended as of the date of such determination, and the Agreement shall at all times be construed and applied in such a manner as will preserve the foregoing intent of the parties, and no event of default shall be deemed to have occurred as a result of the suspension of any such provision(s). If any provision of this Agreement is so suspended, the

suspension shall not affect other provisions or application of this Agreement which can be given effect without the suspended provision. To this end the provisions of this Agreement are severable.

- D. The Urban Renewal Covenants in Article 3 of this Agreement shall not be applicable to conduct by the Developer and its successors and assigns in ownership or possession of the Property during any fiscal year in which the installment on the Development Grant will not be paid in full due to the City's exercise of the right of non-appropriation under this article. However, any conduct in violation of the Urban Renewal Covenants shall be promptly remedied in any subsequent fiscal year in which the City appropriates sufficient funds to fully pay the estimated amount of the installment on the Development Grant due in that fiscal year.

## **ARTICLE 5. [INTENTIONALLY OMITTED.]**

## **ARTICLE 6. CITY COVENANTS.**

Sec. 6.1. Urban Renewal Amendment. City shall diligently proceed with all necessary actions to promptly consider adoption, in conformance with applicable law, of an amendment to the Urban Renewal Plan for the Project Area to include the construction of the Improvements as an urban renewal project under Iowa Code Section 403.5(5)(b). Notwithstanding anything in this Agreement to the contrary, this Agreement, and Developer's obligations hereunder, shall be of no force or effect unless and until the City adopts such an amendment. If for any reason the City has not adopted such an amendment by June 1, 2020, Developer may, any time thereafter and prior to adoption of such an amendment, and notwithstanding any cure period provided under this Agreement, unilaterally and upon notice to City terminate this Agreement, with each party hereto thereafter relieved of further obligation or liability that does not expressly survive termination of this Agreement.

## **ARTICLE 7. REMEDIES.**

### **Sec. 7.1. In General.**

- A. Sec. 6.1. In General. A. Except as otherwise specifically provided in this Agreement, in the event of a default by either party under this Agreement, the aggrieved party shall, by written Notice of Default to the party in default, demand that it proceed immediately to cure or remedy such default, and, in any event, complete such cure or remedy within forty-five (45) days (or such other time as may be specifically provided herein) after receipt of such notice. Any default on an obligation to pay money shall be cured within twenty (20) business days after receipt of such notice. Notwithstanding the foregoing, if any non-monetary default reasonably requires more than forty-five (45) days

to cure, such default shall not constitute a breach of this Agreement if the defaulting party commences to cure the default promptly upon receipt of the notice of the default and with due diligence thereafter continuously prosecutes such cure to completion, which completion shall occur no more than 100 days after receipt of such notice.

- B. In the event that a Notice of Default is given as provided above and action to cure or remedy the default is not promptly taken or not diligently pursued, or the default is not cured or remedied within the time allowed, then the party in default may be declared to be in breach of this Agreement by the aggrieved party. In the event of a breach of this Agreement, in addition to such other rights as the aggrieved party may have hereunder, the aggrieved party may institute proceedings for damages for breach of contract. In any claim, action or civil proceeding wherein damages are sought for breach of this Agreement, City shall have the same rights and liabilities as a private non-governmental party for any breach of this Agreement.

#### Sec. 7.2. Special Remedies.

- A. *Minor delay in completing the Improvements.* In the event the Improvements are not substantially completed by June 30, 2022, to qualify for issuance of the Certificate of Completion as required by Section 1.2, but the Improvements are substantially completed by September 30, 2022, to then qualify for issuance of the Certificate of Completion, the delay shall not constitute a default under this Agreement and the only remedy is a delay in the start of the installments on the Development Grant as provided in Section 4.3.
- B. *Major delay in completing the Improvements.* If the Improvements are not substantially completed by December 31, 2022, to qualify for issuance of the Certificate of Completion, it shall constitute a default under this Agreement. If such default is not timely remedied and Developer is declared to be in breach of this Agreement pursuant to Section 7.1, above as a result thereof, then City may elect to terminate this Agreement, whereupon, subject to the foregoing, neither party shall have any further obligation to the other under this Agreement, including, without limitation, with respect to the Urban Renewal Covenants.
- C. If Developer becomes noncompliant with the maintenance obligation in subsection 3.2(3) due to the Improvements being materially damaged by fire or other casualty, it shall not constitute a default under this Agreement, but City may elect to temporarily withhold all payments on the City Grant which become due and payable while Developer remains noncompliant with such maintenance obligation.
  - a. If repairs to restore the Improvements to their former condition in substantial conformance with the approved Conceptual Development

Plan shall be commenced within six months after such damage occurred and shall be diligently pursued to completion (subject to such delay as may be allowed by Section 5.4), then upon completion of such repairs the noncompliance with subsection 3.2(3) shall be considered remedied and the City shall promptly release all withheld payments on the City Grant.

- b. If Developer does not timely commence or complete repairs to remedy the noncompliance with subsection 3.2(3) as provided above, it shall constitute a default under this Agreement. If such default is not timely remedied after notice of such default is given by City as provided in Section 5.1, and if Developer is declared to be in breach of this Agreement for such default as provided in Section 5.1, then:
  - i. Developer shall have no further obligation under this Agreement and City shall promptly issue and record a Termination Certificate acknowledging that Developer is relieved of all obligations under this Agreement; and,
  - ii. Except for the obligation to promptly issue and record the Termination Certificate, City shall have no further obligation under this Agreement, including but not limited to the obligation to advance any payments on the City Grant which became due and payable after the Improvements were so damaged.

Sec. 7.3. Other Rights and Remedies, No Waiver by Delay. City and Developer shall have the right to institute such actions or proceedings as each may deem desirable for effectuating the purposes of this article. Provided, that any delay by City or Developer in instituting or prosecuting any such actions or proceedings or otherwise asserting its rights shall not operate as a waiver of such rights or to deprive either City or Developer of or limit such rights in any way; it being the intent of this provision that City and Developer should not be constrained to exercise such remedies at a time when such party may still hope otherwise to resolve the problems created by the default involved so as to avoid the risk of being deprived of or limited in the exercise of such remedies because of concepts of waiver, laches, or otherwise. No waiver in fact made by City or Developer with respect to any specific default by the other party shall be considered or treated as a waiver of the rights of City or Developer with respect to any other defaults by the other party or with respect to the particular default, as the case may be, except to the extent specifically waived in writing by City or Developer.

Sec. 7.4. Enforced Delay in Performance. Except for an obligation to pay money to the other pursuant to this Agreement, neither City nor Developer shall be considered in breach of, or in default of, its obligations with respect to this Agreement, or any portion thereof, including redevelopment, or the beginning and completion of construction of the Improvements, in the event of an enforced delay in the performance of such obligations due to unforeseeable causes beyond its control and without its fault or negligence,



including, but not restricted to, temporary injunctions, acts of God, acts of the public enemy, acts of government (provided City may not rely upon its own acts as reason for delay), acts of the other party, fires, floods, epidemics, quarantine restrictions, strikes or other labor disruptions, freight embargoes, and weather or delays of subcontractors due to such causes; it being the purpose and intent of this provision that in the event of the occurrence of any such enforced delay, the time or times for performance of the obligations of City or of Developer, as the case may be, shall be extended for the period of the enforced delay: Provided, that the party seeking the benefit of the provisions of this article shall, within twenty (20) days after the beginning of any such enforced delay, have notified the other party thereof in writing, and of the cause or causes thereof, and setting forth the anticipated extension required as a result of the enforced delay.

Sec. 7.5. Rights and Remedies Cumulative. The rights and remedies of the parties to this Agreement, whether provided by law or by this Agreement, shall be cumulative, and the exercise by either party of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other such remedies for the same default or breach or of any of its remedies for any default or breach by the other party. No waiver made by either party shall be deemed a waiver in any respect in regard to any other rights of the party making the waiver or of any other obligations of the other party.

## **ARTICLE 8. MISCELLANEOUS.**

Sec. 8.1. Representatives Not Individually Liable. No member, official or employee of City or Developer shall be personally liable in the event of any default or breach by either party under this Agreement, or for any amount which may become due or on any obligations under the terms of this Agreement.

Sec. 8.2. City Not a Guarantor, Surety or Partner. City is not a guarantor or surety for the redevelopment nor for any indebtedness incurred by Developer. It is mutually understood that nothing in this Agreement is intended or shall be construed as in any way creating or establishing the relationship of copartners between the parties hereto, or as constituting Developer as a contractor, agent or representative of City for any purpose or in any manner whatsoever.

Sec. 8.3. Interpretation of Contract.

A. *Documents to be Considered Together.* The approved Conceptual Development Plan and any approved changes or modifications thereto shall be incorporated into this Agreement effective as of the date of such approvals. Any interpretation of the provisions of this Agreement shall be made by construing this Agreement and its Exhibit hereto together with the approved Conceptual Development Plan and any approved amendments thereto. Copies of all such documents shall be placed on permanent file in the Office of the City Clerk, City Hall, 400 Robert D. Ray Drive, Des Moines, Iowa.

B. *Choice of Laws.* This Agreement shall be construed in accordance with the laws of the State of Iowa.

C. *Timing.* Time is of the essence in the performance of this Agreement.

D. *Non-working Days.* In the event the last date for performing any act required by this Agreement falls upon a weekend day or holiday, then the time for performing such act shall be extended to the next following working day.

E. *Counterparts.* This Agreement may be executed in multiple counterparts, each of which shall constitute one and the same instrument.

F. *Successors and Assigns.* This Agreement shall inure to the benefit of and shall be binding upon successors and assigns of the parties.

G. *Construction.* Headings are included for convenience only and are not intended to be part of, or to affect the meaning or interpretation of, this Agreement. All section references, unless otherwise clearly indicated, are to sections in this Agreement. Words and phrases shall be construed as in the singular or plural number, and as masculine, feminine or neuter gender, according to context. This Agreement is not to be construed more strictly against a party hereto merely because it may have been drafted or prepared by such party or its counsel, this Agreement being the product of negotiation.

Sec. 8.4. Waiver of Jury Trial. City and Developer each hereby irrevocably waives all right to trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement or any instrument or document delivered hereunder.

Sec. 8.5. Notices. A notice, demand, or other communication under this Agreement by either party to the other shall be sufficiently given or delivered if it is dispatched by registered or certified mail, postage prepaid, return receipt requested; delivered personally; or sent by overnight courier service, as follows:

(a) in the case of Developer, addressed to:

Aust Real Estate, LLC  
1031 7<sup>th</sup> Street  
West Des Moines, IA 50265

(b) in the case of City, addressed to:

Attn: City Manager  
c/o Office of Economic Development  
City of Des Moines  
400 Robert D. Ray Drive  
Des Moines, Iowa, 50309,

or to such other address, Department or individual as either may, from time to time, designate in writing and forward to the other as provided in this article.

Sec. 8.6. Recordation. City shall cause this Agreement (exclusive of the Conceptual Development Plan) to be promptly recorded at City's expense with the Polk County Recorder. A copy of this Agreement, including all the Exhibits shall be maintained and available for public inspection in the office of the City Clerk of City.

Sec. 8.7. Termination Certificate. Upon the termination of this Agreement as provided herein or upon satisfaction by the parties of all their obligations under this Agreement (including payment of the Development Grant), City shall promptly issue to Developer a Termination Certificate certifying that Developer has satisfied all its obligations under this Agreement. Such Termination Certificate shall be in recordable form to permit it to be recorded in the records of the Polk County Recorder. Developer may utilize the Termination Certificate as evidence of its compliance with and satisfaction of all its obligations under this Agreement. If City has failed to issue a Termination Certificate when Developer believes it is entitled to one, Developer may deliver a notice to the City requesting a Termination Certificate and certifying the grounds for its issuance. If City fails to deliver a response to Developer disputing the grounds for issuance of Termination Certificate within twenty (20) days after the delivery of Developer's notice, such failure to respond shall have the same force and effect as if the City had issued a Termination Certificate. Any reference to the "Term" of this Agreement shall mean the period of time between the Effective Date and the termination of this Agreement, whether or not memorialized in a Termination Certificate

Sec. 8.8. Amendment. No amendment of this Agreement is binding unless set forth in a writing, duly signed by the parties hereto.

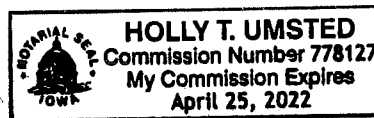
**IN WITNESS WHEREOF**, the parties have caused this Agreement to be duly executed on or as of the Effective Date.

**AUST REAL ESTATE, LLC**  
an Iowa limited liability company

By: M Aust  
Print name: Matt Aust  
Its: Member

STATE OF IOWA  
COUNTY OF POLK

} ss:



This instrument was acknowledged before me on September 9, 2020, by Matt Aust as member of **Aust Real Estate, LLC**, an Iowa limited liability company, on behalf of whom

the instrument was executed.

Holly F. Umsted  
Notary Public in the State of Iowa  
My commission expires: 4/25/22

**CITY OF DES MOINES, IOWA**

ATTEST:

By: \_\_\_\_\_  
P. Kay Cmelik, City Clerk

By: \_\_\_\_\_  
T.M. Franklin Cownie, Mayor

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. 19-\_\_\_\_\_ of City Council on the \_\_\_\_\_, 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

APPROVED AS TO FORM:

\_\_\_\_\_  
Thomas G. Fisher Jr.  
Assistant City Attorney

**EXHIBIT A**  
**LEGAL DESCRIPTION**

Lots 1, 2, and 3 in FERRINGTON PLACE, and Official Plat now in and forming a part of the City of Des Moines, Polk County, Iowa.