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**DEVELOPMENT AGREEMENT  
(114-126 N. Cherry Street)**

**by and between the**

**CITY OF OLATHE, KANSAS**

**and**

**CHERRY SANTA FE, LLC**

**December 11, 2024**

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## DEVELOPMENT AGREEMENT

**THIS DEVELOPMENT AGREEMENT** (this “**Agreement**”) is entered into by and between the **CITY OF OLATHE, KANSAS**, a municipal corporation duly organized and existing under the laws of the State of Kansas as a city of the first class (the “**City**”), and **CHERRY SANTA FE, LLC**, a Kansas limited liability company authorized to do business in the State of Kansas, (the “**Developer**,” and together with the City, the “**Parties**,” and each a “**Party**”), and is dated as of December 11, 2024 (the “**Effective Date**”).

### **RECITALS**

**WHEREAS**, the City is the owner of certain real property comprised of approximately 0.36 acres generally located at 114-126 N. Cherry Street, all in the City of Olathe, Johnson County, Kansas, as legally described on **Exhibit A** attached hereto (the “**Property**”); and

**WHEREAS**, the City has the authority to undertake community improvement district financing pursuant to the Kansas Community Improvement District Act, K.S.A. 12-6a26 *et seq.* (the “**CID Act**”); and

**WHEREAS**, within a reasonable time of the Effective Date, the City will submit a petition countersigned by the Developer (the “**CID Petition**”) requesting the formation of the CID (as defined below) and the imposition of a two-percent (2.0%) tax on the sale of tangible personal property at retail and rendering or furnishing of services in the CID (the “**CID Sales Tax**”) in accordance with the CID Act; and

**WHEREAS**, pursuant to a public hearing to be held and an ordinance to be considered by the City promptly upon submitting the CID Petition (the “**CID Ordinance**”), the City intends to create a community improvement district encompassing the Property, the boundaries of which are legally described on **Exhibit A** attached hereto (the “**CID**”) and approve the imposition of the CID Sales Tax, all in accordance with the CID Act; and

**WHEREAS**, subject to the Developer’s acquisition of the Property pursuant to the Real Estate Contract (defined herein and executed by the Parties concurrently with this Agreement) and the City’s adoption of the CID Ordinance and a resolution of intent for the IRB financing as described herein, the Developer seeks to renovate, redevelop or improve the existing building located upon the Property to consist of some or all of the following uses: multiple restaurant and retail locations, including an approximately 3,634 square foot portion of the facility to be initially occupied by Austin’s Bar & Grill, an approximately 4,500 square foot rooftop patio accessible by elevator for use by Austin’s Bar & Grill and another restaurant user, and such other facilities or improvements associated with or incidental to such use, including demolition of existing facilities and public and private infrastructure improvements or facilities (if any), on the Property as necessary to serve such use, as generally described in the Project Budget (defined hereinafter) and generally depicted on the conceptual rendering attached hereto as **Exhibit F** (collectively, the “**Project**”); and

**WHEREAS**, the City is authorized and empowered under the provisions of K.S.A. 12-1740 to 12-1749d, inclusive (the “**IRB Act**”), to issue industrial revenue bonds to pay the cost of certain facilities (as defined in the IRB Act) for the purposes set forth in the IRB Act, and to lease such facilities to private persons, firms or corporations; and

**WHEREAS**, concurrently with the calling and holding of a public hearing to consider the CID Ordinance, the City intends to consider a resolution determining the City’s intent to issue its industrial revenue bonds to finance the costs of acquiring, constructing and equipping the Property and Project for purposes of (i) granting a 10-year, 100% real property tax abatement (excluding mills that cannot be abated under Kansas law) for the Property and Project and (ii) providing a sales tax exemption for the purchase of building materials, equipment and labor for the Project, and to adopt such resolutions and ordinances and authorize the execution and delivery of such instruments and the taking of such action as may be necessary or advisable for the authorization and issuance of said bonds by the City and take or cause to be taken such other action as may be required to implement the aforesaid; and

**WHEREAS**, the Parties agree that construction and improvement of the Project and the CID financing and IRB financing is to their mutual benefit; and

**WHEREAS**, the City and the Developer now desire to enter into this Agreement to formalize the development and financing of the Project.

**NOW, THEREFORE**, in consideration of the foregoing, and of the mutual covenants and agreements herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties do hereby agree as follows:

## **ARTICLE I DEFINITIONS AND RULES OF CONSTRUCTION**

**Section 1.01. Rules of Construction.** For all purposes of this Agreement, except as otherwise expressly provided or unless the context otherwise requires, the following rules of construction apply in construing the provisions of this Agreement.

- A. The terms defined in this Article include the plural as well as the singular.
- B. All accounting terms not otherwise defined herein shall have the meanings assigned to them, and all computations herein provided for shall be made, in accordance with generally accepted accounting principles.
- C. All references herein to “generally accepted accounting principles” refer to such principles in effect on the date of the determination, certification, computation or other action to be taken hereunder using or involving such terms.

D. All references in this instrument to designated “Articles,” “Sections” and other subdivisions are to be the designated Articles, Sections and other subdivisions of this instrument as originally executed.

E. The words “herein,” “hereof” and “hereunder” and other words of similar import refer to this Agreement as a whole and not to any particular Article, Section or other subdivision.

F. The Article and Section headings herein are for convenience only and shall not affect the construction hereof,

G. The representations, covenants and recitations set forth in the foregoing recitals are material to this Agreement and are hereby incorporated into and made a part of this Agreement as though they were fully set forth in this Section. The provisions of the CID Petition, and such resolutions and ordinances of the City introduced or adopted by the City Council which create the CID and approved the CID Sales Tax, and the provisions of the CID Act, as amended, are hereby incorporated herein by reference and made a part of this Agreement, subject in every case to the specific terms hereof.

**Section 1.02. Definitions of Words and Terms.** Capitalized words used in this Agreement shall have the meanings set forth in the Recitals to this Agreement or they shall have the following meanings:

“**50/50 Limitation**” has the meaning set forth in **Section 6.02** hereof.

“**Agreement**” means this Development Agreement, as amended from time to time.

“**Applicable Law and Requirements**” means any applicable constitution, treaty, statute, rule, regulation, ordinance, order, directive, code, interpretation, judgment, decree, injunction, writ, determination, award, permit, license, authorization, directive, requirement or decision of or agreement with or by Governmental Authorities.

“**Certificate of Costs**” means a certificate relating to costs of the Project in substantially the form attached hereto as **Exhibit B**.

“**Certificate of Substantial Completion**” means a certificate evidencing the Substantial Completion of the Project in substantially the form attached hereto as **Exhibit C**.

“**CID**” means the community improvement district to be created by the City pursuant to the CID Ordinance.

“**CID Act**” means the Kansas Community Improvement District Act, K.S.A. 12-6a26 through 12-6a36, as amended and supplemented from time to time.

“**CID Costs**” means those costs listed as “CID Eligible Costs” in the Project Budget attached as **Exhibit D** hereto and eligible to be paid from CID Revenues in accordance with K.S.A. 12-6a26 *et seq.*

“**CID Costs Cap**” means One Million Dollars and 00/100 Dollars (\$1,000,000).

“**CID Fund**” means the 114-126 N. Cherry Street CID Fund, created pursuant to the CID Act and Section 6.02 hereof.

“**CID Ordinance**” means the ordinance establishing the CID referred to in the recitals hereof.

“**CID Policy**” has the meaning set forth in **Section 4.05** hereof.

“**CID Revenues**” means of the revenues generated from the CID Sales Tax and deposited into the CID Fund.

“**CID Sales Tax**” means the 2.00% community improvement district sales tax within the CID, as described in the recitals to this Agreement.

“**CID Term**” means that period of time equal to twenty-two (22) years beginning on the date the CID Sales Tax is first imposed within the CID.

“**City**” means the City of Olathe, Kansas.

“**City Event of Default**” shall have the meaning set forth in Section 9.02 of this Agreement.

“**City Loan**” means the loan described in Section 6.02 of this Agreement.

“**City Representative**” means the Mayor or City Manager of the City, and such other person or persons at the time designated to act on behalf of the City in matters relating to this Agreement.

“**Code**” means the Internal Revenue Code of 1986, as amended.

“**Commencement Date**” means the date on which the CID Sales Tax is first imposed.

“**Construction Plans**” means plans, drawings, specifications and related documents, and construction schedules for the construction of the Project, together with all supplements, amendments or corrections, submitted by the Developer and (if required to be pursuant to Applicable Law and Requirements) approved by the City in accordance with this Agreement.

“**County**” means Johnson County, Kansas.

“**Developer**” means Cherry Santa Fe, LLC, a limited liability company organized and existing under the laws of the State of Kansas, and any successors and assigns permitted pursuant to this Agreement.



**“Developer Event of Default”** shall have the meaning set forth in **Section 9.01** of this Agreement.

**“Developer Representative”** means Michael Berenbom and such other person or persons designated and duly authorized to act on behalf of the Developer in matters relating to this Agreement.

**“Excusable Delays”** means any delay beyond the reasonable control of the Party affected, caused by damage or destruction by fire or other casualty, power failure, strike, shortage of materials, unavailability of labor, delays in the receipt of Permitted Subsequent Approvals as a result of unreasonable delay on the part of the applicable Governmental Authorities, governmental closures, governmental required workforce reduction, or governmental limitations on the performance of construction work, enemy or hostile government action, pandemics, epidemics, quarantine restrictions, adverse weather conditions such as, by way of illustration and not limitation, severe rain storms or below freezing temperatures of abnormal degree or abnormal duration, tornadoes, and any other events or conditions, which shall include but not be limited to any litigation interfering with or delaying the construction of all or any portion of the Project in accordance with this Agreement, which in fact prevents the Party so affected from discharging its respective obligations hereunder.

**“Governmental Approvals”** means all plat approvals, re-zoning or other zoning changes, site plan approvals, conditional use permits, variances, building permits, architectural review or other subdivision, zoning or similar approvals required for the implementation of the Project and the CID, and consistent with this Agreement.

**“Governmental Authorities”** means any and all jurisdictions, entities, courts, boards, agencies, commissions, offices, divisions, subdivisions, departments, bodies or authorities of any type of any governmental unit (federal, state or local) whether now or hereafter in existence.

**“Maintenance Plan”** means the maintenance plan as set forth in **Exhibit G** hereto.

**“Municipal Code”** means the municipal code of the City, as may be supplemented or amended.

**“Pay As You Go”** means “Pay-as-you-go financing” as defined in the CID Act.

**“Permitted Subsequent Approvals”** means the building permits and other governmental approvals customarily obtained prior to construction which have not been obtained on the date that this Agreement is executed, which the City or other governmental entity has not yet determined to grant.

**“Plans”** means the Site Plan, Construction Plan and all other Governmental Approvals necessary to construct the Project in accordance with City’s Unified Development Ordinance, applicable laws of Governmental Authorities and this Agreement.

**“Project”** shall have the meaning described in the recitals to this Agreement.

“**Project Budget**” means the project budget as set forth in **Exhibit D** hereto.

“**Project Improvements**” shall have the meaning set forth in **Section 4.01** hereof.

“**Project Schedule**” means the project schedule as set forth in **Exhibit E** hereto.

“**Proposed Purchaser**” shall have the meaning set forth in **Section 8.06** hereof.

“**Real Estate Contract**” means the Real Estate Contract between the City and Developer relating to the Property and dated December 11, 2024, as the same may be amended from time to time pursuant to its terms.

“**Site Plan**” means the final site development plan for the Project submitted by the Developer to the City and approved by the City pursuant to applicable City ordinances, regulations and City’s Unified Development Ordinance provisions, which may be approved as a whole or approved in phases or stages.

“**Statutory Limitations**” means, with respect to the City, the Kansas Cash-Basis Law (K.S.A. 10-1101 *et seq.*) and the Budget Law (K.S.A. 79-2925 *et seq.*).

“**Substantial Completion**” has the meaning set forth in **Section 4.07**.

“**Unified Development Ordinance**” means the Unified Development Ordinance adopted by the City of Olathe, Kansas, as amended from time to time in accordance with the provisions thereof.

## ARTICLE II REPRESENTATIONS AND WARRANTIES

**Section 2.01. Representations of City.** The City makes the following representations and warranties, which are true and correct on the date hereof, to the best of the City’s knowledge:

A. **Due Authority**. The City has full constitutional and lawful right, power and authority, under current applicable law, to execute and deliver and perform the terms and obligations of this Agreement, and this Agreement has been duly and validly authorized and approved by all necessary City proceedings, findings and actions. Accordingly, this Agreement constitutes the legal valid and binding obligation of the City, enforceable in accordance with its terms.

B. **No Defaults or Violation of Law**. The execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, and the fulfillment of the terms and conditions hereof do not and will not conflict with or result in a breach of any of the terms or conditions of any agreement or instrument to which it is now a party, and do not and will not constitute a default under any of the foregoing.

C. **No Litigation**. There is no litigation, proceeding or investigation pending or, to the knowledge of the City, threatened against the City with respect to the Project or this Agreement. In addition, no litigation, proceeding or investigation is pending or, to the knowledge of the City, threatened against the City seeking to restrain, enjoin or in any way limit the approval or issuance and delivery of this Agreement or which would in any manner challenge or adversely affect the existence or powers of the City to enter into and carry out the transactions described in or contemplated by the execution, delivery, validity or performance by the City of the terms and provisions of this Agreement.

D. **Governmental or Corporate Consents**. No consent or approval is required to be obtained from, and no action need be taken by, or document filed with, any governmental body or corporate entity in connection with the execution and delivery by the City of this Agreement.

E. **No Default**. No default or City Event of Default has occurred and is continuing, and no event has occurred and is continuing which with the lapse of time or the giving of notice, or both, would constitute a default or a City Event of Default in any material respect on the part of the City under this Agreement.

#### **Section 2.02. Representations of the Developer.**

The Developer makes the following representations and warranties, which are true and correct on the Effective Date, to the Developer's actual knowledge:

A. **Due Authority**. The Developer has all necessary power and authority to execute and deliver and perform the terms and obligations of this Agreement and to execute and deliver the documents required of the Developer herein, and such execution and delivery has been duly and validly authorized and approved by all necessary proceedings. Accordingly, this Agreement constitutes the legal valid and binding obligation of the Developer, enforceable in accordance with its terms.

B. **No Defaults or Violation of Law**. The execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, and the fulfillment of the terms and conditions hereof do not and will not conflict with or result in a breach of any of the terms or conditions of any corporate or organizational restriction or of any agreement or instrument to which it is now a party, and do not and will not constitute a default under any of the foregoing.

C. **No Litigation**. No litigation, proceeding or investigation is pending or, to the knowledge of the Developer, threatened against the Project, the Developer or any officer, director, member or shareholder of the Developer and affecting the Project. In addition, no litigation, proceeding or investigation is pending or, to the knowledge of the Developer, threatened against the Developer seeking to restrain, enjoin or in any way limit the approval or issuance and delivery of this Agreement or which would in any manner challenge or adversely affect the existence or powers of the Developer to enter into and carry out the transactions described in or contemplated by the execution, delivery, validity or performance by the Developer, of the terms and provisions of this Agreement. Further, none of Developer, its principals or officers, or any related, affiliated, or parent company of Developer, is currently engaged in or has threatened a suit, action, or proceeding against the City.

D. **No Material Change.** There has been no material adverse change in the business, financial position, prospects or results of operations of the Developer, which could materially and adversely affect the Developer's ability to perform its obligations pursuant to this Agreement from that shown in the financial information provided by the Developer to the City in connection with this Agreement.

E. **Governmental or Corporate Consents.** As of the Effective Date, to Developer's knowledge, no additional consent or approval is required to be obtained from, and no action need be taken by, or document filed with, any governmental body or corporate entity, in connection with the execution, delivery and performance by the Developer of this Agreement, other than Permitted Subsequent Approvals, approval of the CID Ordinance, and issuance of the IRBs.

F. **No Default.** To Developer's knowledge, no default or Developer Event of Default has occurred and is continuing, and no event has occurred and is continuing which with the lapse of time or the giving of notice, or both, would constitute a default or a Developer Event of Default in any material respect on the part of the Developer under this Agreement, or any other material agreement or material instrument affecting the Property to which the Developer is a party or by which the Developer is or may be bound.

G. **Approvals.** Except for Permitted Subsequent Approvals, the Developer has received and is in good standing with respect to all certificates, licenses, inspections, franchises, consents, immunities, permits, authorizations and approvals, governmental or otherwise, necessary to conduct and to continue to conduct its business as heretofore conducted by it and to own or lease and operate the Property as contemplated to be owned or leased by it under this Agreement. Except for Permitted Subsequent Approvals, approval of the CID Ordinance, issuance of the IRBs, and closing under the Real Estate Contract, the Developer has obtained all certificates, licenses, inspections, franchises, consents, immunities, permits, authorizations and approvals, governmental or otherwise, necessary to acquire, construct, equip, operate and maintain the Project. The Developer reasonably believes that all such certificates, licenses, consents, permits, authorizations or approvals which have not yet been obtained will be obtained in due course.

H. **Construction Permits.** Except for Permitted Subsequent Approvals, all governmental permits and licenses required by applicable law to construct, occupy and operate the Project have been issued and are in full force and effect or, if the present stage of development does not allow such issuance, the Developer reasonably believes, after due inquiry of the appropriate governmental officials, that such permits and licenses will be issued in a timely manner in order to permit the Project to be constructed.

I. **Compliance with Laws.** The Developer is in compliance with all valid laws, ordinances, orders, decrees, decisions, rules, regulations and requirements of every duly constituted governmental authority, commission and court applicable to any of its affairs, business, operations contemplated by this Agreement.

J. **Other Disclosures.** To Developer's knowledge, the information furnished to the City by the Developer in connection with the matters covered in this Agreement are true and correct in all material respects and do not contain any untrue statement of any material fact and do

not omit to state any material fact required to be stated therein or necessary to make any statement made therein, in the light of the circumstances under which it was made, not misleading.

**Section 2.03. Developer's Acquisition of the Property.** At the time that this Agreement is executed, Developer represents that, pursuant to the Real Estate Contract, it may acquire fee simple title to all of the Property which constitutes all of the real property in the CID, except for adjacent public right-of-way.

**Section 2.04. Conditions to the Effective Date of this Agreement.** Contemporaneously with the execution of this Agreement, and as a precondition to the effectiveness of this Agreement, the Developer shall submit the following documents to the City:

- A. A copy of the Developer's Articles of Organization and certificate of good standing to conduct business in the State of Kansas, certified by the Secretary of State of the State of Kansas; and
- B. A copy of the Operating Agreement of the Developer.
- C. A legal opinion from counsel to the Developer in form and substance reasonably acceptable to the City covering: (i) the due organization of the Developer and the power and authority of the Developer to execute this Agreement, and (ii) the enforceability of this Agreement against the Developer.

### **ARTICLE III REIMBURSEMENT OF DEVELOPER'S COSTS**

**Section 3.01. Developer to Advance Costs.** Except as otherwise set forth herein, Developer will advance all costs as necessary to complete the Project. City agrees that it will waive or pay all fees relating to the submission of the CID Petition, analysis of the CID, approval of the CID Ordinance, and implementation of the CID, including, without limitation, any petition fee, advanced funds deposit or administrative service fee as described in the CID Policy.

**Section 3.02. City's Obligation to Reimburse Developer.**

A. **Obligation to Reimburse.** Subject to the terms of this Agreement and the conditions in this Section, the City shall reimburse Developer for CID Costs in a total amount not to exceed the CID Costs Cap and for other costs of the Project from the City Loan. The Developer shall be reimbursed on a Pay As You Go basis as set forth in **Article VI** hereof.

B. **Timing of Reimbursement.** Subject to the terms of this Agreement, (i) the City shall have no obligation to reimburse Developer from the proceeds of the CID Fund until funds are available in the CID Fund and the conditions listed in **Section 6.01(C)** hereof are satisfied; and (ii) the City shall have no obligation to reimburse Developer from the proceeds of the City Loan until the conditions listed in **Section 6.02(D)** hereof are satisfied.

C. **Source of Reimbursement.** The City shall make payments from the CID Fund on a Pay As You Go basis in the order of priority set forth in **Section 6.01.**

### **Section 3.03. Developer Reimbursement Process.**

A. All requests for reimbursement of costs shall be made in a Certificate of Costs in substantial compliance with the form attached hereto as **Exhibit B.** Requests for reimbursement shall be submitted by the Developer to the City not more often than quarterly; provided, Developer shall not submit to the City a Certificate of Costs relating to CID Costs until the Developer has submitted a Certificate of Substantial Completion for the Project. The Developer shall provide itemized invoices, receipts or such other information reasonably satisfactory to the City to confirm that any such cost has been paid and qualifies as a CID Cost or cost of the Project, as applicable, and shall further provide a summary sheet detailing the costs requested to be reimbursed and the source of funds from which Developer seeks reimbursement (i.e., either the CID Fund or the City Loan). Such summary sheet shall show the date such cost was paid, the payee, a brief description of the type of cost paid, and the amount paid. The Developer shall provide such additional information as reasonably requested by the City to confirm that such costs have been paid and qualify as CID Costs or cost of the Project, as applicable.

B. The City reserves the right, upon reasonable written notice to Developer, to have its engineer or other agents or employees inspect all work in respect of which a Certificate of Costs is submitted, to examine the Developer's and others' records relating to all expenses related to the invoices to be paid, and to obtain from such parties such other information as is reasonably necessary for the City to evaluate compliance with the terms hereof.

C. The City shall have thirty (30) calendar days after receipt of any Certificate of Costs to review and respond by written notice to the Developer. If the submitted Certificate of Costs and supporting documentation demonstrates that (1) the request relates to CID Costs, if applicable; (2) the expense has been paid; (3) Developer is not in material default under this Agreement; (4) there is no fraud on the part of the Developer; and (5) the conditions precedent listed in **Section 6.01(C)** and/or **Section 6.02(D)**, as applicable, have been satisfied, then the City shall approve the Certificate of Costs and make, or cause to be made, reimbursement from the CID Fund or City Loan in accordance with **Article VI** hereof within thirty (30) days of the City's approval of the Certificate of Costs; provided, the City shall not be obligated to disburse to the Developer CID Funds or proceeds of the City Loan more frequently than quarterly. If such funds are not so received by Developer due to the City's inability to process the Certificate of Costs within the time set forth above, the unpaid balance shall be subject to a penalty of one and one half percent (1.5%) per month until paid, but in no event shall such penalty exceed eighteen percent (18%) per annum, and Developer shall be relieved of any and all obligations under this Agreement until paid. If the City reasonably disapproves of the Certificate of Costs in accordance with this **Article III**, the City shall notify the Developer in writing of the reason for such disapproval within such 30-day period, in which event the Developer shall have the right to revise and re-submit the Certificate of Costs to address the City's reason for disapproval, and the City will review and approve (or disapprove) the revised Certificate of Costs in accordance with this Section. Approval of the Certificate of Costs will not be unreasonably withheld, conditioned or delayed.

**Section 3.04. Right to Inspect and Audit.** The Developer agrees that, up to one year after completion of the Project, the City, with reasonable advance notice and during normal business hours, shall have the right and authority to review and audit, from time to time, all the Developer's books and records relating to the costs of the Project (including, but not limited to, all general contractor's sworn statements, general contracts, subcontracts, material purchase orders, waivers of lien, paid receipts and invoices); provided, however, that (to the extent it may legally do so) the City agrees to maintain the confidentiality of the foregoing materials and, under no circumstances, allow the same to become public record.

**Section 3.05. Limitation on City's Payment Obligations.** Notwithstanding any other term or provision of this Agreement, the City's obligation to reimburse the Developer (i) for CID Costs shall be limited to monies in the CID Fund to which the Developer has rights under this Agreement and shall not be payable from any other source, and (ii) from proceeds of the City Loan will be subject to the 50/50 Limitation.

**Section 3.06. The CID, Generally.** The City shall not, under any circumstances other than by a future written agreement between the parties, terminate the CID or take any action to reduce the CID Term prior to such time as the Developer has been reimbursed for the total CID Costs Cap. The Developer shall not, under any circumstances other than by future written agreement between the parties, protest or seek to modify or terminate the CID or the CID Sales Tax.

#### **ARTICLE IV THE PROJECT**

**Section 4.01. Scope of the Project.** Subject to the terms and conditions of this Agreement, the Developer shall construct, or cause to be constructed, the improvements comprising the Project (collectively, the "Project Improvements").

**Section 4.02. Project Schedule.**

A. Subject to the terms and conditions of this Agreement, upon Developer's acquisition of the Property and receipt of all applicable Governmental Approvals, the Developer shall promptly commence (or cause to be commenced), and shall promptly thereafter diligently prosecute to completion, the construction of the Project in accordance with the Project Schedule attached as **Exhibit E**, subject to delays caused by Excusable Delays and delays caused by the City.

B. Subject to the terms and conditions of this Agreement, the Developer shall complete each of its obligations under this Agreement with respect to the acquisition, construction, and completion of the Project Improvements in accordance with the Project Schedule, subject to delays caused by Excusable Delays and delays caused by the City. The completion of the Project shall be evidenced by the Developer's delivery of a Certificate of Substantial Completion in accordance with **Section 4.07** of this Agreement.

C. The City agrees to act in good faith to timely process and review all Plans and consider the issuance of all necessary permits and other approvals, including building permits, rezoning approvals, preliminary and final plat approval, and all other permits or approvals which are required for the Developer and businesses within the CID to construct the Project. To the extent the City determines that any Plans or other documents or requests submitted by the Developer for the City's approval are unacceptable, as determined pursuant to the Unified Development Ordinance and the Municipal Code, the City shall provide a written description detailing the portions of the Plans or documents that are unacceptable.

**Section 4.03. Project Budget.** The estimated Project Budget is attached as Exhibit D hereto. The total investment in the Project is estimated at approximately Seven Million Nine Thousand Six Hundred Eighty-Six Dollars and 00/100 (\$7,009,686.00). The Parties hereby agree that the Project Budget is not a proposed cap on the amount of any specific type of expenditure shown in Exhibit D; rather, the City will reimburse Developer for any CID Costs up to the CID Costs Cap. Developer hereby acknowledges that the Project remains subject to the City's planning process as set forth in the Unified Development Ordinance and Municipal Code, and the approval of a Site Plan (or related approvals) may require additional Project components on the Property not currently contemplated by the Project Budget, the cost of which will be the responsibility of Developer (subject to Developer rights to reimbursement as set forth in this Agreement).

**Section 4.04. Design of Project.** In order to further the development of the Project, the City hereby authorizes the Developer to construct, or cause to be constructed, the Project according to the final Plans approved by the City.

**Section 4.05. Project Zoning, Planning, Platting and Construction.**

A. **Site Plan.** The parties agree and acknowledge that the City has approved, or the City will consider approving, the Site Plan for the Project pursuant to the Unified Development Ordinance. The Site Plan will be in substantial conformance with this Agreement; provided the Site Plan may change from time to time, in Developer's sole discretion subject to compliance with the Unified Development Ordinance.

B. **Construction Plans.** After approval of the Site Plan, the Developer shall submit Construction Plans for the Project for review and approval pursuant to the Unified Development Ordinance and Municipal Code. Construction Plans may be submitted in phases or stages. The Developer agrees that all construction, improvement, equipping, and installation work on the Project shall be done in accordance with the Site Plan, Construction Plans, and related documents to be approved by the City in compliance with City's Unified Development Ordinance and Municipal Code. Any material deviations to the Site Plan must be approved by the City if and to the extent such approval is required pursuant to the City's Unified Development Ordinance.

C. **Construction Permits and Approvals.** Before commencement of construction or development of any buildings, structures or other work or improvements, the Developer shall, at its own expense, secure or cause to be secured any and all permits and approvals which may be required by the City's Unified Development Ordinance, Municipal Code, and any other Applicable Law and Requirements, with respect to such buildings, structures or other work or improvements.



The City shall cooperate with and provide all usual assistance to the Developer in securing these permits and approvals, and shall diligently process, review and consider all such permits and approvals as may be required by law; except that the City shall not be required to issue any such permits or approvals for any portion of the Project not in substantial conformance with this Agreement or the Unified Development Ordinance and Municipal Code.

D. **Development Schedule.** Subject to the terms and conditions of this Agreement, the Developer shall commence construction of the Project in good and workmanlike manner in accordance with the terms of this Agreement and shall cause the Project to be completed with due diligence, subject to delays caused by Excusable Delays and delays caused by the City. During the construction period of the Project (the “**Construction Period**”), Developer will provide monthly construction progress reports to the City Manager or his designee. Additionally, upon reasonable advance notice not more often than once per month during the Construction Period, the Developer shall meet with the City to review and discuss the design and construction of the Project in order to enable the City to monitor the status of construction and to determine that the Project is being performed and completed substantially in accordance with this Agreement.

E. **Continuation and Completion.** Subject to Excusable Delays and the terms and conditions of this Agreement, once the Developer has commenced construction of the Project, or a particular phase of the Project as permitted under this Agreement, the Developer shall not permit cessation of work on the Project or such phase of the Project for a period in excess of thirty (30) consecutive days or sixty (60) days in the aggregate without prior written consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed.

F. **Antidiscrimination During Construction.** The Developer, for itself, its successors and assigns, and any contractor with whom the Developer has contracted for the performance of work on the Project, agrees that in the construction, renovation, improvement, equipping, repair and installation of the Project provided for in this Agreement, the Developer shall not discriminate against any employee or applicant for employment because of race, color, creed, religion, age, sex, marital status, disability, national origin or ancestry.

G. **No Waiver.** Nothing in this Agreement shall constitute a waiver of the City’s right to consider and approve or deny Governmental Approvals pursuant to the City’s regulatory authority as provided by the City’s Unified Development Ordinance, Municipal Code, and applicable state law. The Developer acknowledges that satisfaction of certain conditions contained in this Agreement requires the reasonable exercise of the City’s discretionary zoning authority by the City’s Planning Commission and City Council in accordance with the City’s Unified Development Ordinance and applicable state law.

H. **Public Art.** Developer will comply with Section 2.82.130 of the Olathe Municipal Code relating to public art associated with development incentives for the Project. Costs incurred as a result of compliance with Section 2.82.130 relating to public art may be reimbursed with CID Revenues and shall be deemed by the City to be “Eligible Projects” as set forth in Section 2.A. of City Council Policy F-9 (the “CID Policy”).

I. **Utilization of City-Owned Utilities.** In accordance with Section 4.B.6. of the CID Policy, Developer and any tenants, subtenants, operators, and licensees of the Project will use City-

owned utilities, including the City's water, sewer, and solid waste services, unless it is demonstrated in writing that a City-owned utility cannot feasibly provide acceptable service to such portion of the Project.

**Section 4.06. Rights of Access.** Representatives of the City shall have the right of access to the Property, upon reasonable notice to Developer in advance, without charges or fees, at normal construction hours during the period of construction, for the purpose of ensuring compliance with this Agreement, including, but not limited to, the inspection of the work being performed in constructing, renovating, improving, equipping, repairing and installing the Project, so long as they comply with all safety rules. Except in case of emergency, prior to any such access, such representatives of the City will check in with the on-site manager. Such representatives of the City shall carry proper identification, shall insure their own safety, assuming the risk of injury, and shall not interfere with the construction activity.

**Section 4.07. Certificate of Substantial Completion.** Promptly after the Substantial Completion of the Project in accordance with the provisions of this Agreement, the Developer may submit a Certificate of Substantial Completion to the City. "**Substantial Completion**" shall mean that the Developer shall have completed the Project (or applicable phase of the Project) in substantial compliance with the Plans and shall have been granted a Temporary Certificate of Occupancy for such phase by the City Building Official. The Certificate of Substantial Completion shall be in substantially the form attached as Exhibit C. The City shall, within thirty (30) days following delivery of the Certificate of Substantial Completion, carry out such inspections as it deems reasonably necessary to verify to its reasonable satisfaction the accuracy of the certifications contained in the Certificate of Substantial Completion. The City's execution of the Certificate of Substantial Completion shall constitute evidence of the satisfaction of the Developer's agreements and covenants to construct the Project.

## ARTICLE V USE OF THE CID

### **Section 5.01. Permitted Uses; City Approvals.**

A. **Permitted Uses.** Upon Substantial Completion of the Project and continuing during the Term of this Agreement, Developer shall operate (or cause to be operated) the Project substantially in accordance with the description of the Project uses as described herein unless approved in writing by the City, such approval not to be unreasonably withheld, conditioned, or delayed.

B. **City Approvals.** Except for an Approved Lessee (defined below), the Developer may not sell or lease the Property or any portion thereof unless approved in writing by the City Manager or his/her designee, such approval not to be unreasonably withheld, conditioned, or delayed. If Developer wishes to sell or lease any portion of the Property, Developer will present such potential disposition to the City in writing prior to entering such legal obligation for the sale or lease of such Property. The City will respond to Developer with its approval or disapproval (or, in the case of a proposed sale, the City's exercise of its ROFR described herein), in the City's reasonable discretion, within thirty (30) days of the receipt of such communication. Developer

shall promptly notify the City upon execution of any such legal obligation for the sale or lease of the Property.

C. **Approved Lessees.** Notwithstanding the foregoing, restaurant uses (except for restaurants with a primary business of serving pizza-by-the-slice seeking to occupy a portion of the Project within two (2) years of the Commencement Date) (collectively, “**Approved Lessees**”) will be deemed a permitted use of the Project, and no City approval as described in the subsection above will be required for Developer to lease space to any Approved Lessees. For the two (2) years following the Commencement Date, the City intends to deny occupancy of the Project to any restaurant with a primary business of serving pizza-by-the-slice.

#### **Section 5.02. Operation of Project.**

A. **Compliance with Applicable Laws.** The Project shall substantially comply with all applicable building and zoning, health, property maintenance, environmental and safety codes and laws and all other applicable laws, rules and regulations. The Developer shall, at its own expense, secure or cause to be secured any and all permits which may be required by the Unified Development Ordinance and any Applicable Law and Requirements for the construction and operation of the Project, including but not limited to obtaining all necessary rental licenses and paying any necessary fees to obtain required permits and licenses.

B. **Maintenance.** During the term of this Agreement, Developer shall cause the Property and Project owned by it thereon, and all parts thereof, to be maintained, preserved and kept in good repair and working order and in good and safe condition, consistent with industry standards for similarly situated projects in the greater metropolitan Kansas City area. Developer may make additions, alterations and changes to the Project so long as such additions, alterations and changes are made in compliance with all Applicable Law and Requirements, and as long as the same do not materially adversely affect Developer’s ability to perform its obligations under this Agreement. Additionally, except as permitted otherwise in this Agreement, the Developer will diligently maintain all public access drives, parking areas, landscape areas, and open space areas, if any, within the Property, and will repair any and all damage (reasonable wear and tear excepted) to such areas in a timely manner, in accordance with all applicable codes and property maintenance standards implemented for similarly situated projects in the Kansas City area, and the Project shall otherwise be maintained in accordance with the “Maintenance Plan” attached hereto as **Exhibit G.**

C. **Continuous Operation.** Developer shall continuously operate (or cause to be operated) the Project as described herein, subject to Excusable Delays and delays caused by the City, following the Substantial Completion and opening to the public of the Project. Developer shall use commercially reasonable efforts to lease vacant space(s) to appropriate users for the Project with a primary focus on obtaining restaurant uses.

#### **Section 5.03. Sales Tax Information.**

A. Promptly upon approval of the CID Ordinance, the City will deliver a copy of the CID Ordinance to the Kansas Department of Revenue (KDOR). The Developer shall use

commercially reasonable efforts to provide the City written notice of all current tenants of the Project within thirty (30) days of the opening or closing for business of any business within the Project, and at all other reasonable times upon the written request of the City Manager or the Director of Economy.

B. The Developer shall provide to the City simultaneously with submission to the Kansas Department of Revenue the sales tax returns for Developer's facilities in the CID, and such obligation shall be a covenant running with the land enforceable against all businesses operating in the CID that will only terminate: (i) upon the passage by the City of an ordinance terminating the CID; or (ii) upon termination of this Agreement as provided hereunder.

C. The Developer agrees to use commercially reasonable efforts to cause all prospective assignees, purchasers, tenants, subtenants or any other entity acquiring property or occupancy rights in the CID following the Effective Date to be obligated by written contract (lease agreement or other enforceable document) to provide to the City, simultaneously with submission to the Kansas Department of Revenue, the sales tax returns for their facilities in the CID. The Developer hereby agrees that it will use commercially reasonable efforts to ensure that each such prospective lease agreement provides that the City is an intended third-party beneficiary of such provisions and has a separate and independent right to enforce such provisions directly against such tenant or purchaser.

C. To the extent it may legally do so, information obtained pursuant to this Section shall be kept confidential by the City in accordance with K.S.A. 79-3657 and the City shall take all actions necessary to preserve the confidentiality thereof and to ensure that, under no circumstances, will such information become public record.

#### **Section 5.04. Taxes, Assessments, Encumbrances and Liens.**

A. So long as the Developer owns the real property within the CID, the Developer shall pay (or cause to be paid), prior to delinquency, all real estate taxes and assessments on the real property owned by the Developer within the CID. Nothing herein shall be deemed to prohibit the Developer from contesting the validity or amounts of any tax, assessment, encumbrance or lien, nor to limit the remedies available to the Developer in respect thereto.

B. Developer agrees that no mechanics' or other liens shall be established or remain against the Project, or the funds in connection with any of the Project, for labor or materials furnished in connection with any acquisition, construction, additions, modifications, improvements, repairs, renewals or replacements so made. However, the Developer shall not be in default if mechanics' or other liens are filed or established and the Developer contests in good faith said mechanics' liens and in such event may permit the items so contested to remain undischarged and unsatisfied during the period of such contest and any appeal therefrom. The Developer hereby agrees and covenants to indemnify and hold harmless the City in the event any liens are filed against the Project as a result of the acts of the Developer, its agents or independent contractors.

**Section 5.05. Financing During Construction; Rights of Holders.**

A. **No Encumbrances Except Mortgages during Construction.** Notwithstanding any other provision of this Agreement, mortgages are permitted for the acquisition, construction, renovation, improvement, equipping, repair and installation of the Project and to secure permanent financing thereafter. However, nothing contained in this paragraph is intended to permit or require the subordination of general property taxes, special assessments or any other statutorily authorized governmental lien to be subordinate in the priority of payment to such mortgages.

B. **Holder Not Obligated to Construct Improvements.** The holder of any mortgage authorized by this Agreement shall not be obligated by the provisions of this Agreement to construct or complete the Project or to guarantee such construction or completion. Nothing in this Agreement shall be deemed to construe, permit or authorize any such holder to devote the CID to any uses or to construct any improvements thereon, other than those uses or improvements provided for or authorized by this Agreement.

C. **Notice of Default to Mortgage Holders; Right to Cure.** With respect to any mortgage granted by Developer as provided herein, whenever the City shall deliver any notice or demand to Developer with respect to any breach or default by the Developer in completion of construction of the Project, the City shall at the same time deliver to each holder of record of any mortgage authorized by this Agreement a copy of such notice or demand, but only if City has been requested to do so in writing by Developer. Each such holder shall (insofar as the rights of the City are concerned) have the right, at its option, within sixty (60) days after the receipt of the notice, to cure or remedy or commence to cure or remedy any such default and to add the cost thereof to the mortgage debt and the lien of its mortgage. Nothing contained in this Agreement shall be deemed to permit or authorize such holder to undertake or continue the construction or completion of the Project (beyond the extent necessary to conserve or protect the Project or construction already made) without first having expressly assumed the Developer's obligations to the City by written agreement satisfactory to and with the City. The holder, in that event, must agree to complete, in the manner provided in this Agreement, that portion of the Project to which the lien or title of such holder relate, and submit evidence satisfactory to the City that it has the qualifications and financial responsibility necessary to perform such obligations.

D. The restrictions on Developer financing in this Section are intended to and shall apply only to financing during the construction period for the improvements and any financing obtained in connection therewith. Nothing in this Agreement is intended or shall be construed to prevent the Developer from obtaining any financing for the Project or any aspect thereof.

E. Notwithstanding anything contained in this Agreement to the contrary, the restrictions on assignment, transfer and conveyance of the rights, duties and obligations of the Developer under this Agreement shall not apply to any collateral assignment of the Developer's rights to reimbursement of CID Costs from the CID Fund to secure indebtedness of the Developer; provided that such assignment or transfer shall not grant the assignee or transferee a right to seek direct reimbursement from the CID Fund without written consent of the City.

**Section 5.06. Covenant for Non-Discrimination.** The Developer covenants by and for itself and any successors in interest that there shall be no discrimination against or segregation of any person or group of persons on account of race, color, creed, religion, sex, marital status, age, disability, national origin or ancestry in the sale, lease, sublease, transfer, use, occupancy, tenure or enjoyment of the CID, nor shall the Developer itself or any person claiming under or through it establish or, to the actual knowledge of Developer or such other person claiming under or through it, permit any such practice or practices of discrimination or segregation with reference to the selection, location, number, use or occupancy of tenants, lessees, subtenants, sublessees or vendees of the CID.

The covenant established in this Section shall, without regard to technical classification and designation, be binding for the benefit and in favor of the City, its successors and assigns and any successor in interest to the CID or any part thereof. The covenants contained in this Section shall remain for so long as this Agreement is in effect.

**Section 5.07. Industrial Revenue Bonds.** Developer may submit, and the City agrees to consider in good faith upon receipt, an application for issuance of industrial revenue bonds to be purchased by Developer or its designee (“IRBs”), in one or more series, granting a 10-year, 100% real property tax abatement (excluding mills that cannot be abated under Kansas law), and a sales tax exemption for the purchase of building materials, equipment, and labor for any portion of the Project eligible for such incentives. Concurrently with the calling and holding of a public hearing to consider the CID Ordinance, the City shall also consider a resolution determining the City’s intent to issue the IRBs. Developer acknowledges that property constructed or purchased with the proceeds of IRBs and used in a retail enterprise identified under the North American industry classification system (NAICS) sectors 44 and 45 cannot be exempt from property taxation pursuant to IRBs. City agrees that it will waive or pay all fees relating to the application for and issuance of such IRBs, including, without limitation, the City’s application fee, the City’s origination fee, the City’s bond counsel fees, trustee fees, costs of completing any cost benefit analysis, and Kansas Board of Tax Appeals filing fees.

**ARTICLE VI  
REIMBURSEMENT OF CID COSTS;  
COMMUNITY IMPROVEMENT DISTRICT FINANCING; CITY LOAN**

**Section 6.01. CID Fund.**

A. **Creation of CID Fund; Deposit of CID Revenues.** The City shall establish and maintain a separate fund and account known as the 114-126 N. Cherry Street CID Fund (the “CID Fund”). All CID Revenues received by the City shall be deposited into the CID Fund.

B. **Disbursements from the CID Fund.** All disbursements from the CID Fund shall be made only to pay CID Costs. Such disbursements shall be made in the following order of preference:

1. For the first three (3) years after commencement of the CID Sales Tax, one hundred percent (100%) of the funds in the CID Fund will be used to reimbursement Developer's CID Costs, subject to the CID Costs Cap.

2. Thereafter:

a. Twenty-five (25%) of the funds in the CID Fund will be used to reimburse Developer's CID Costs, subject to the CID Costs Cap.

b. Seventy-five percent (75%) of the funds in the CID Fund will be reserved for use by the City.

3. After Developer has been reimbursed to the CID Costs Cap, all remaining funds in the CID Fund will be reserved for use by the City.

C. **Conditions Precedent to Reimbursements.** Developer hereby understands and agrees that it shall not receive any reimbursements from the CID Fund unless and until the conditions precedent set forth below have been fully satisfied as determined by City in its sole reasonable discretion:

1. Developer submits a Certificate of Costs for CID Costs; and

2. City has approved the Certificate of Costs; and

3. Developer shall be in substantial compliance with the material terms and conditions of this Agreement and the Maintenance Plan; and

4. With respect to the CID Costs that are the subject of the request for reimbursement, the Developer shall have advanced all costs and shall have provided evidence of such advances; and

5. A Certificate of Substantial Completion for the Project shall have been submitted to and approved by the City; and

6. Developer shall have fully paid (or caused to be fully paid) all outstanding property taxes on the Property that are then due, subject to Developer's legal rights to protest.

#### **Section 6.02. City Loan.**

A. **Generally.** To assist with financing the costs of the Project, the City will make a home rule economic development grant to Developer in an amount of up to \$2,200,000 to be disbursed under the terms of this section and subject to Statutory Limitations (the "City Loan").

B. **Terms.** The City Loan will carry an interest rate of zero percent (0.0%) and mature three (3) months after the twenty-second (22<sup>nd</sup>) anniversary of the Commencement Date (the "Maturity Date"). If any portion of the City Loan remains outstanding on the Maturity Date, such

amount is deemed forgiven by the City and Developer will not be responsible for repayment of such unpaid balance of the City Loan.

C. **Disbursements of the City Loan; 50/50 Limitation.** All disbursements of the City Loan shall be made to pay costs of the Project no more often than quarterly upon the conditions set forth below. The proceeds of the City Loan available for reimbursement of Developer's costs of the Project shall be limited to an amount which is equal to one-half (1/2) of the amount of costs that Developer has paid with private funds. In other words, the reimbursement of Project costs from the City Loan shall be paid on a 50/50 basis between such private funds and the City Loan, and there shall not at any time be more costs of the Project paid with the proceeds of the City Loan than the amount of costs paid by Private Funds (the "50/50 Limitation"). Additionally, no costs of the Projects reimbursed by the City Loan may also be reimbursed with proceeds of the CID Fund.

D. **Conditions Precedent to Reimbursement with Proceeds of the City Loan.** Developer hereby understands and agrees that it shall not receive any reimbursements from the City Loan unless and until the conditions precedent set forth below have been fully satisfied as determined by City in its reasonable discretion:

1. Developer submits a certificate of costs in substantially the form of **Exhibit B** with an accounting of private funds spent to date with supporting documentation; and
2. City has approved such certificate; and
3. Developer shall be in substantial compliance with the material terms and conditions of this Agreement, the Maintenance Plan, and the 50/50 Limitation; and
4. With respect to the costs that are the subject of the request for reimbursement, the Developer shall have advanced all costs and shall have provided evidence of such advances; and
5. Developer shall have commenced construction of the Project (as set forth in the Real Estate Contract); and
6. Developer shall have fully paid (or caused to be fully paid) all outstanding property taxes on the Property that are then due, subject to Developer's legal rights to protest.

## **ARTICLE VII ASSIGNMENT; TRANSFER**

### **Section 7.01. Transfer of Obligations.**

A. Except as otherwise provided in this Agreement, including (without limitation) this Section, the rights, duties and obligations hereunder of the Developer may not be assigned, in whole or in part, to another entity, without the prior approval of the City Council, such approval not to be unreasonably withheld, conditioned, or delayed. Any proposed assignee shall have



qualifications and financial responsibility, as reasonably determined by the City Manager, necessary and adequate to fulfill the obligations of the Developer with respect to the portion of this Agreement being assigned. Any proposed assignee shall, by instrument in writing, for itself and its successors and assigns, and expressly for the benefit of the City, assume all of the obligations of the Developer under this Agreement and agree to be subject to all the conditions and restrictions to which the Developer is subject (or, in the event the assignment is of or relates to a portion of this Agreement, such obligations, conditions and restrictions to the extent that they relate to such portion), in which event the Developer shall be relieved from any such obligations so assigned. The Developer agrees to record all assignments in the office of the Register of Deeds of Johnson County, Kansas, in a timely manner following the execution of such agreements, and to provide to the City proof of such recording so assigned.

B. The Parties' obligations pursuant to this Agreement, unless earlier satisfied, shall inure to and be binding upon the heirs, executors, administrators, successors and assigns of the respective parties as if they were in every case specifically named and shall be construed as a covenant running with the land, enforceable against the purchasers or other transferees as if such purchaser or transferee were originally a party and bound by this Agreement. No transferee or owner of property within the CID except the Developer shall be entitled to any rights whatsoever or claim upon the CID Revenues or City Loan as set forth herein, except as specifically authorized in writing by the Developer.

C. The foregoing restrictions on assignment shall not apply to (and City approval shall not be required for): (a) any security interest granted to secure indebtedness to any construction or permanent lender (including, without limitation, collateral assignment of the Developer's rights hereunder to receive CID Revenues), and (b) any assignment to an Affiliate (as defined below). For purposes of this Agreement, the term "Affiliate" means any person, entity, subsidiary, affiliate or group of persons or entities in which the ownership or membership is owned or controlled by the Developer or a majority of its partners.

**Section 7.02. Corporate Reorganization.** Nothing herein shall prohibit (or require City approval to allow) the Developer from forming additional development or ownership entities to replace or joint venture with Developer for the purpose of business and/or income tax planning.

## **ARTICLE VIII GENERAL COVENANTS**

### **Section 8.01. Indemnification of City.**

A. Developer agrees to indemnify and hold the City, its employees, agents and independent contractors and consultants (collectively, the "**City Indemnified Parties**") harmless from and against any and all suits, claims, costs of defense, damages, injuries, liabilities, judgments, costs and/or expenses, including court costs and reasonable attorney's fees, resulting from, arising out of, or in any way connected with:

1. The Developer's actions and undertakings in the implementation of the CID and this Agreement;
2. The negligence or willful misconduct of Developer, its employees, agents or independent contractors and consultants in connection with the management, design, development, redevelopment and construction of the Project; and.
3. Any reasonable expense incurred by the City resulting from any litigation filed against the Developer by any member or shareholder of the Developer, any prospective investor, prospective partner or joint venture partner, lender, co-proposer, architect, contractor, consultant or other vendor.

This section shall not apply to liability for any damage or injury caused by the willful misconduct or negligence of the City or its officers, employees or agents. This section includes, but is not limited to, any repair, cleanup, remediation, detoxification, or preparation and implementation of any removal, remediation, response, closure or other plan (regardless of whether undertaken due to governmental action) concerning any hazardous substance or hazardous wastes including petroleum and its fractions as defined in (i) the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"; 42 U.S.C. Section 9601, et seq.), (ii) the Resource Conservation and Recovery Act ("RCRA"; 42 U.S.C. Section 6901 et seq.) and (iii) Article 34, Chapter 65, K.S.A. and all amendments thereto, at any place where Developer owns or has control of real property pursuant to any of Developer's activities under this Agreement; provided, however, in the event of a conflict between this sentence and the terms and provisions of the Real Estate Contract, the Real Estate Contract shall control. The foregoing indemnity is intended to operate as an agreement pursuant to Section 107 (e) of CERCLA to assure, protect, hold harmless and indemnify City from liability.

B. In the event any suit, action, investigation, claim or proceeding (collectively, an "**Action**") is begun or made as a result of which the Developer may become obligated to one or more of the City Indemnified Parties hereunder, any one of the City Indemnified Parties shall give prompt notice to the Developer of the occurrence of such event.

C. The right to indemnification set forth in this Agreement shall survive the termination of this Agreement.

**Section 8.02. Insurance.** So long as this Agreement is in effect: (A) Developer shall maintain, or cause to be maintained, insurance with respect to the Project covering such risks that are of an insurable nature and of the character customarily insured against by organizations operating similar properties and engaged in similar operations (including, but not limited to, property and casualty, worker's compensation and general liability) and in such amounts as, in the reasonable judgment of Developer, are adequate to protect the Developer and the Project owned by Developer, and (B) upon written request by the City, Developer agrees to provide the City evidence of property insurance and a certificate of liability insurance demonstrating compliance with this Section.

### **Section 8.03. Obligation to Restore.**

A. **Restoration of Project by Developer.** Developer hereby agrees that if any portion of the Project owned by it shall be damaged or destroyed, in whole or in part, by fire or other casualty, the Developer shall promptly restore, replace or rebuild the same, or shall promptly cause the same to be restored, replaced or rebuilt, to as nearly as possible the value, quality and condition it was in immediately prior to such fire or other casualty or taking, with such alterations or changes as may be approved in writing by the City, which approval shall not be unreasonably withheld, conditioned or delayed. The Developer agrees that it shall include in any documents for Developer private financing a requirement that, in the event insurance covering fire or other casualty results in payment of insurance proceeds to a lender, the lender shall be obligated to restore the Project in accordance with this Section. Upon Substantial Completion of the Project, the Developer shall give prompt written notice to the City of any material damage or destruction to any of the Project owned by it by fire or other casualty.

B. **Enforcement.** The restrictions set forth in this Section are for the benefit of the City and may be enforced by the City by a suit for specific performance or for damages, or both.

**Section 8.04. Non-liability of Officials, Employees and Agents of the City.** No recourse shall be had for the reimbursement of the CID Costs or for any claim based thereon or upon any representation, obligation, covenant or agreement contained in this Agreement against any past, present or future official, officer, employee or agent of the City, under any rule of law or equity, statute or constitution or by the enforcement of any assessment or penalty or otherwise, and all such liability of any such officials, officers, employees or agents as such is hereby expressly waived and released as a condition of and consideration for the execution of this Agreement.

**Section 8.05. Community Benefit.** The Developer agrees to, itself or through one or more Affiliates, actively participate in the civic, charitable, educational, philanthropic and economic development of the City. Accordingly, at a minimum, the Developer or an Affiliate shall: (a) at all times be a dues-paying member in good standing with the Olathe Chamber of Commerce; (b) make an annual donation to the Olathe Community Foundation in an amount no less than \$3,000; and (c) no later than March 1 of each year of the term of this Agreement, submit to the City's Director of Economy a written report providing evidence of the Developer's compliance with this Section and philanthropic activity and community involvement within the City.

**Section 8.06. City Right of First Refusal and Rights to Purchase.** During the term of this Agreement, the City shall have the right of first refusal to buy the Property or any portion thereof that Developer should elect to sell to an unrelated third party ("**ROFR**") and the right to repurchase the Property or any portion thereof in accordance with the following:

A. **Developer Offer for Sale.** In the event Developer or an Affiliate should elect to sell the Property or portion thereof to an unrelated third party, Developer shall first provide to the City written notice summarizing the consideration and all other relevant terms and conditions on which Developer is willing to sell the Property or portion thereof (the "**Sale Offer**"). The City shall then have thirty (30) days following Developer's notice to notify Developer in writing whether City will exercise the ROFR on the offered terms and enter into a purchase agreement for

the purchase of the Property (or such portion thereof). The City shall have the right to inspect the Property in order to make the determination of whether to exercise the ROFR, and the Developer shall, upon 24 hours' prior written notice to Developer, provide the City reasonable access to the Property, during normal business hours, for purposes of the same. If the City does not timely exercise the ROFR or thereafter close on the purchase of the Property (or such portion thereof), then the City will be deemed to have waived its ROFR pursuant to this subsection and, for the following period of one year, Developer may sell the Property (or such portion) to a third party for an amount greater than or equal to 90% of the purchase price included in the Sale Offer. The ROFR described herein applies only to an original sale, conveyance or other transfer by Developer to an unrelated third party, and (provided such original sale, conveyance or other transfer complied with the terms hereof) shall not apply to any subsequent sale, conveyance or other transfer by any third party. If the City chooses to exercise the ROFR, the City and Developer will coordinate to accommodate the City's purchase of the Property or applicable portion thereof on the terms and conditions set forth in the notice Developer provided to the City and/or such other terms and conditions as the parties agree in writing.

B. **Developer Financing Default.** In the event Developer defaults under this Agreement or its loan (or other private financing arrangement) for the Property beyond any applicable notice and cure period, and the Property is subject to foreclosure, the City shall have the right to purchase the Property at the price sufficient to pay off such loan relating to the Property. Upon Developer's default under this Agreement, its loan or other financing arrangement, Developer shall promptly notify the City of the same, including the amount of outstanding Developer debt or other financing relating to the Property. Prior to the earlier of (i) ninety (90) days after the City's receipt of such notice or (ii) the cure period provided in such loan, the City shall notify Developer whether City will exercise the City's purchase right pursuant to the terms of this subparagraph. If the City chooses to exercise its purchase right, the City and Developer will coordinate to accommodate the City's purchase of the Property on the terms and conditions set forth in this subparagraph or such other terms and conditions as the parties agree in writing.

#### **Section 8.07. Parking.**

A. Once any part of the Project is open for business and until the later of (i) two (2) years following that opening or (ii) until such time as the surface parking lot immediately adjacent to the east of the Property (the "**Parking Lot**") is redeveloped at a future date, the parking spaces highlighted in pink on **Exhibit H** (the "**Parking Spaces**") shall be available for the Project on a nonexclusive basis, at no cost or expense to Developer, and shall be limited to 2-hour parking from 9am-5pm on Monday-Friday.

B. Two (2) dedicated Parking Spaces on the east side of Cherry Street (in front of the Project) may be reserved for customer pick-up at Developer's discretion. Additionally, two (2) fifteen (15) minute Parking Spaces will be made available in the same vicinity.

C. If the Parking Lot is redeveloped during the term of this Agreement, the City commits to providing non-restricted public access to parking facilities in an amount approximately greater than or equal to the number of parking spaces currently available in the Parking Lot and

within similar proximity or closer to the Project, with the Developer bearing no responsibility for the cost or expense in the construction of those facilities.

**Section 8.08. Alleyways; Pedestrian Access.**

A. **East Alleyway.** The City shall maintain, at the City's sole cost and expense, the alley located immediately behind the Property to the east (shown as East Alley in **Exhibit H**) in good condition and repair so long as City owns the same.

B. **South Alleyway.** Subject to the requirements of the Americans with Disabilities Act and maintaining adequate pedestrian access, the City shall vacate from vehicular traffic or otherwise prevent vehicular traffic (e.g., install bollards) in the alley located immediately to the south of the Property (shown as South Alley in **Exhibit H**) in order to provide an outdoor dining space for the Project. Such outdoor dining space will be located on the northern portion of the South Alley and configured and constructed in consultation with the City in such a way to allow public pedestrian access between Cherry Street and the parking lot east of the Project within the remainder of the alley, and to allow emergency vehicle access within such alley at all times.

C. **Pedestrian Access.** Subject to ADA requirements and maintaining adequate pedestrian access as required by the Olathe Municipal Code and Unified Development Ordinance, tenants of the Project may use the sidewalk on the east side of Cherry Street for signage, seating, and other ancillary uses.

**Section 8.09. Development of City-Owned Parcels Downtown.** For two (2) years following the Commencement Date, the City does not intend to sell or lease any portion of property the City owns within downtown Olathe for use as a sports bar which may be considered a direct competitor to and with a menu substantially similar to that of Austin's Bar & Grill (such as, but not limited to, Tanner's, Coach's, Johnny's Tavern, The Peanut, The Other Place, or The Bar).

**ARTICLE IX  
DEFAULTS AND REMEDIES**

**Section 9.01. Developer Event of Default.** Subject to **Section 9.05**, a "Developer Event of Default" shall mean a default in the performance of any obligation or breach of any covenant or agreement of the Developer in this Agreement (other than a covenant or agreement, a default in the performance or breach of which is specifically dealt with elsewhere in this Agreement), and continuance of such default or breach for a period of thirty (30) days after the City has delivered to Developer a written notice specifying such default or breach and requiring it to be remedied; provided, that if such default or breach cannot be fully remedied within such 30-day period, but can reasonably be expected to be fully remedied and the Developer is diligently attempting to remedy such default or breach, such default or breach shall not constitute an event of default if the Developer shall promptly upon receipt of such notice diligently attempt to remedy such default or breach and shall thereafter prosecute and complete the same with due diligence and dispatch.

**Section 9.02. City Event of Default.** Subject to Section 9.05, the occurrence and continuance of any of the following events shall constitute a “**City Event of Default**” hereunder:

Default in the performance of any obligation or breach of any other covenant or agreement of the City in this Agreement, and continuance of such default or breach for a period of thirty (30) days after there has been given to the City by the Developer a written notice specifying such default or breach and requiring it to be remedied; provided, that if such default or breach cannot be fully remedied within such 30-day period, but can reasonably be expected to be fully remedied and the City is diligently attempting to remedy such default or breach, such default or breach shall not constitute an event of default if the City shall immediately upon receipt of such notice diligently attempt to remedy such default or breach and shall thereafter prosecute and complete the same with due diligence and dispatch.

**Section 9.03. Remedies Upon a Developer Event of Default.**

A. Upon the occurrence and continuance of a Developer Event of Default beyond any applicable notice and cure period, the City shall have the following rights and remedies, in addition to any other rights and remedies provided under this Agreement or by law:

1. The City shall have the right to terminate this Agreement and the Real Estate Contract or terminate all or any portion of Developer’s rights under this Agreement and the Real Estate Contract.
2. The City may pursue any available remedy at law or in equity by suit, action, mandamus or other proceeding to enforce and compel the performance of the duties and obligations of the Developer as set forth in this Agreement, to enforce or preserve any other rights or interests of the City under this Agreement or otherwise existing at law or in equity and to recover any damages incurred by the City resulting front such Developer Event of Default.

B. Upon termination of this Agreement due to a Developer Event of Default, the City shall have no obligation to reimburse the Developer for any amounts advanced under this Agreement or costs otherwise incurred or paid by Developer.

C. If the City has instituted any proceeding to enforce any right or remedy under this Agreement by suit or otherwise, and such proceeding has been discontinued or abandoned for any reason, or has been determined adversely to the City, then and in every case the City and the Developer shall, subject to any determination in such proceeding, be restored to their former positions and rights hereunder, and thereafter all rights and remedies of the City shall continue as though no such proceeding had been instituted.

D. The exercise by the City of any one remedy shall not preclude the exercise by it, at the same or different times, of any other remedies for the same default or breach. No waiver made by the City shall apply to obligations beyond those expressly waived.

E. Any delay by the City in instituting or prosecuting any such actions or proceedings or otherwise asserting its rights under this Section shall not operate as a waiver of such rights or limit it in any way. No waiver in fact made by the City of any specific default by the Developer shall be considered or treated as a waiver of the rights with respect to any other defaults, or with respect to the particular default except to the extent specifically waived.

F. Notwithstanding the foregoing or anything in this Agreement (including, without limitation, this Section) to the contrary, under no circumstances will Developer be liable for any special, punitive, remote, or consequential damages, including (without limitation) lost tax revenues.

#### **Section 9.04. Remedies Upon a City Event of Default.**

A. Upon the occurrence and continuance of a City Event of Default the Developer shall have the following rights and remedies, in addition to any other rights and remedies provided under this Agreement or by law or in equity:

1. The Developer shall have the right to terminate this Agreement and the Developer's obligations hereunder;
2. The Developer may pursue any available remedy at law or in equity by suit, action, mandamus or other proceeding to enforce and compel the performance of the duties and obligations of the City as set forth in this Agreement, to enforce or preserve any other rights or interests of the Developer under this Agreement or otherwise existing at law or in equity and to recover any damages incurred by the Developer resulting from such City Event of Default.

B. If the Developer has instituted any proceeding to enforce any right or remedy under this Agreement by suit or otherwise, and such proceeding has been discontinued or abandoned for any reason, or has been determined adversely to the Developer, then and in every case the Developer and the City shall, subject to any determination in such proceeding, be restored to their former positions and rights hereunder, and thereafter all rights and remedies of the Developer shall continue as though no such proceeding had been instituted.

C. Each of the Developer's remedies provided hereunder shall be cumulative and in addition to each other such remedy, and the exercise by the Developer of any one remedy shall not preclude the exercise by it, at the same or different times, of any other remedies for the same default or breach. No waiver made by the Developer shall apply to obligations beyond those expressly waived.

D. Any delay by the Developer in instituting or prosecuting any such actions or proceedings or otherwise asserting its rights under this paragraph shall not operate as a waiver of such rights or limit it in any way. No waiver in fact made by the Developer of any specific default by the Developer shall be considered or treated as a waiver of the rights with respect to any other defaults, or with respect to the particular default except to the extent specifically waived.

E. Notwithstanding the foregoing or anything in this Agreement (including, without limitation, this Section) to the contrary, under no circumstances will the City be liable for any special, punitive, remote, or consequential damages, including (without limitation) lost profits or revenues.

**Section 9.05. Excusable Delays.** Neither the City nor the Developer shall be deemed to be in default of this Agreement because of an Excusable Delay.

**Section 9.06. Legal Actions.** Any legal actions related to or arising out of this Agreement must be instituted in the District Court of Johnson County, Kansas or, if federal jurisdiction exists, in the United States District Court for the District of Kansas.

## **ARTICLE X GENERAL PROVISIONS**

**Section 10.01. Mutual Assistance.** The City and the Developer agree to take such actions, including the execution and delivery of such documents, instruments, petitions and certifications as may be reasonably necessary or appropriate to carry out the terms, provisions and intent of this Agreement and to reasonably aid and assist each other in carrying out said terms, provisions and intent.

**Section 10.02. Effect of Violation of the Terms and Provisions of this Agreement; No Partnership.** The City is deemed the beneficiary of the terms and provisions of this Agreement, for and in its own rights and for the purposes of protecting the interests of the community and other parties, public or private, in whose favor and for whose benefit this Agreement and the covenants running with the land have been provided. The Agreement shall run in favor of the City, without regard to whether the City has been, remains or is an owner of any land or interest therein in the Project or the CID. The City shall have the right, if this Agreement or covenants herein are breached, to exercise all 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 breaches to which it or any other beneficiaries of this Agreement and covenants may be entitled. Nothing contained herein shall be construed as creating a partnership between the Developer and the City.

**Section 10.03. Time of Essence.** Time is of the essence of this Agreement. The Parties will make every reasonable effort to expedite the subject matters hereof and acknowledge that the successful performance of this Agreement requires their continued cooperation.

**Section 10.04. Amendments.** This Agreement may be amended only by the mutual consent of the Parties, by the adoption of a resolution of the City approving said amendment, as provided by law, and by the execution of said amendment by the Parties or their successors in interest.

**Section 10.05. Agreement Controls.** The Parties agree that the Project will be implemented as agreed in this Agreement and the Real Estate Contract, subject to the terms and conditions hereof and thereof. This Agreement and the Real Estate Contract specify the rights,



duties and obligations of the City and Developer with respect to constructing the Project, the payment of CID Costs and all other methods of implementing the Project. The Parties further agree that this Agreement and the Real Estate Contract supersede all prior agreements, negotiations and discussions relative to the subject matter hereof (including, without limitation, any memorandum of understanding) and are a full integration of the agreement of the Parties.

**Section 10.06. Conflicts of Interest.**

A. No member of the City's governing body or of any branch of the City's government that has any power of review or approval of any of the Developer's undertakings shall participate in any decisions relating thereto which affect such person's personal interest or the interests of any corporation or partnership in which such person is directly or indirectly interested. Any person having such interest shall immediately, upon knowledge of such possible conflict, disclose, in writing, to the City the nature of such interest and seek a determination with respect to such interest by the City and, in the meantime, shall not participate in any actions or discussions relating to the activities herein proscribed. Upon receiving notice of such possible conflict, the City shall promptly disclose the same to Developer in writing and, from that point forward until the Parties reach a mutually-agreeable resolution, keep Developer apprised of the status of such possible conflict.

B. The Developer warrants that it has not paid or given and will not pay or give any officer, employee or agent of the City any money or other consideration for obtaining this Agreement. The Developer further represents that, to its actual knowledge, no officer, employee or agent of the City who exercises or has exercised any functions or responsibilities with respect to the Project during his or her tenure, or who is in a position to participate in a decision making process or gain insider information with regard to the Project, has or will have any interest, direct or indirect, in any contract or subcontract, or the proceeds thereof, for work to be performed in connection with the Project, or in any activity, or benefit therefrom, which is part of the Project at any time during or after such person's tenure.

**Section 10.07. Term.** Unless earlier terminated as provided herein, this Agreement shall remain in full force and effect until the later of the expiration of the CID Term or the time the IRBs are no longer outstanding; provided, however, that this Agreement shall automatically terminate upon termination of the Real Estate Contract prior to Closing (as defined therein).

**Section 10.08. Validity and Severability.** It is the intention of the Parties that the provisions of this Agreement shall be enforced to the fullest extent permissible under the laws and public policies of the State of Kansas, and that the unenforceability (or modification to conform with such laws or public policies) of any provision hereof shall not render unenforceable, or impair, the remainder of this Agreement. Accordingly, if any provision of this Agreement shall be deemed invalid or unenforceable in whole or in part, this Agreement shall be deemed amended to delete or modify, in whole or in part, if necessary, the invalid or unenforceable provision or provisions, or portions thereof, and to alter the balance of this Agreement in order to render the same valid and enforceable.

**Section 10.09. Required Disclosures.** The Developer shall use commercially reasonable efforts to promptly notify the City of the occurrence of any material event which would cause any of the information furnished to the City by the Developer in connection with the matters covered in this Agreement to contain any untrue statement of any material fact or to omit to state any material fact required to be stated therein or necessary to make any statement made therein, in the light of the circumstances under which it was made, not misleading.

**Section 10.10. Tax Implications.** The Developer acknowledges and represents that (1) neither the City nor any of its officials, employees, consultants, attorneys or other agents has provided to the Developer any advice regarding the federal or state income tax implications or consequences of this Agreement and the transactions contemplated hereby, and (2) the Developer is relying solely upon its own tax advisors in this regard.

**Section 10.11. Authorized Parties.** Whenever under the provisions of this Agreement and other related documents, instruments or any supplemental agreement, a request, demand, approval, notice or consent of the City or the Developer is required, or the City or the Developer is required to agree or to take some action at the request of the other Party, such approval or such consent or such request shall be given for the City, unless otherwise provided herein, by the City Representative and for the Developer by any officer of Developer so authorized; and any person shall be authorized to act on any such agreement, request, demand, approval, notice or consent or other action and neither Party shall have any complaint against the other as a result of any such action taken. The City Representative may seek the advice, consent or approval of the City Council before providing any supplemental agreement, request, demand, approval, notice or consent for the City pursuant to this Section.

**Section 10.12. Notice.** All notices and requests required or desired to be given pursuant to this Agreement shall be sent as follows:

To the City:

City Clerk's Office  
City of Olathe  
P.O. Box 768  
Olathe, KS 66051-0768  
cco@olatheks.org

With a copy to:

Ronald R. Shaver, City Attorney  
City of Olathe  
P.O. Box 768  
Olathe, KS 66051-0768  
cityattorney@olatheks.org

To the Developer:

Cherry Santa Fe, LLC  
Attn: Michael Berenbom  
4705 Central Street  
Kansas City, MO 64112

With a copy to:

Husch Blackwell LLP  
Attn: Chris Kline  
4801 Main Street, Ste. 1000  
Kansas City, MO 64112  
chris.kline@huschblackwell.com

and

Kevin Wempe  
Gilmore & Bell, P.C.  
2405 Grand Blvd., Suite 1100  
Kansas City, MO 64108  
kwempe@gilmorebell.com

or at such other addresses as the Parties may indicate in writing to the other in accordance with the provisions of this Agreement (with at least 10 days' notice of such change in writing), either by personal delivery, reputable overnight delivery service (such as UPS or FedEx), by certified mail, return receipt requested, or by email, with electronic or telephonic confirmation of receipt. Any notice sent by: (a) certified mail, return receipt requested, shall be deemed delivered two (2) business days after deposited in the United States Mail; (b) personal delivery shall be deemed delivered when actually received; (c) an overnight delivery service shall be deemed delivered on the business day following the date the notice is deposited with the overnight delivery service; and (d) email shall be deemed duly given as of the date of confirmation of receipt.

**Section 10.13. Kansas Law.** This Agreement shall be governed by and construed in accordance with the laws of the State of Kansas, including the Statutory Limitations. Any action to enforce the provisions of this Agreement shall be brought in the District Court of Johnson County, Kansas or, if federal jurisdiction exists, in the United States District Court for the District of Kansas.

**Section 10.14. Counterparts.** This Agreement may be executed in several counterparts, each of which shall be an original and all of which shall constitute but one and the same agreement. Hand signatures transmitted by electronic mail in portable document format (PDF) or similar format shall also be permitted as binding signatures to this Agreement.

**Section 10.15. Recordation of Agreement.** The Parties agree to execute and deliver an original of this Agreement and any amendments or supplements hereto, or a memorandum of same, in proper form for recording and/or indexing in the appropriate land or governmental records, including, but not limited to, recording in the real estate records of Johnson County, Kansas. This Agreement or a memorandum hereof shall be recorded by the City at the City's sole cost and expense, and proof of recording shall be provided to the Developer.

**Section 10.16. Consent or Approval.** Except as otherwise provided in this Agreement, whenever the consent, approval or acceptance of either Party is required hereunder, such consent, approval or acceptance shall not be unreasonably withheld, conditioned or unduly delayed.

**Section 10.17. Electronic Transactions.** The transaction described herein may be conducted and related documents may be stored by electronic means. Copies, telecopies, facsimiles, electronic files and other reproductions of original executed documents shall be deemed to be authentic and valid counterparts of such original documents for all purposes, including the filing of any claim, action or suit in the appropriate court of law.

[Signature pages follow]

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the Effective Date.

CITY OF OLATHE, KANSAS

By: *John Bacon*  
John Bacon, Mayor

ATTEST:

*Brenda Swearingian*  
Brenda Swearingian, City Clerk



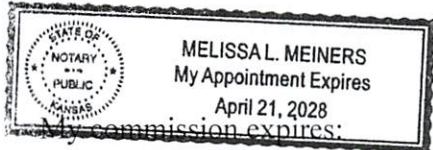
(SEAL)

ACKNOWLEDGMENT

STATE OF KANSAS        )  
  ) SS.  
COUNTY OF JOHNSON    )

On December 20, 2024, before me, the undersigned, a Notary Public in and for said state, personally appeared John Bacon and Brenda Swearingian, proved to me on the basis of satisfactory evidence to be the persons whose names are subscribed to the within instrument as Mayor and City Clerk, respectively, of the CITY OF OLATHE, KANSAS, the city of the first class therein named, and acknowledged to me that they executed the same in their authorized capacities, and that by their signatures on the instrument the entity upon behalf of which the persons acted, executed the instrument.

WITNESS my hand and official seal.



*4121128*

*Melissa Meiners*  
Notary Public

**CHERRY SANTA FE, LLC,**  
a Kansas limited liability company

By: *MB*  
Name: MICHAEL BERENBOM  
Title: MANAGER

ACKNOWLEDGMENT

STATE OF MISSOURI )  
COUNTY OF JACKSON ) SS.

On Dec 17, 2024, before me, the undersigned, a Notary Public in and for said state, personally appeared Michael Berenbom, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument as Manager of Cherry Santa Fe, LLC a Kansas limited liability company, and acknowledged to me that they executed the same in his/her authorized capacity, and that by his/her signature on the instrument the entity upon behalf of which the person acted, executed the instrument.

WITNESS my hand and official seal.

*Elizabeth Kennedy*  
Notary Public

My commission expires: FEB. 10, 2026



Development Agreement (114-126 N. Cherry Street)

**EXHIBIT A**

**LEGAL DESCRIPTION OF CID**

All of Lot 13, except the North 25 feet, and all of lots 14, 17, 18, and 21, Block 46, CITY OF OLATHE, a subdivision of land in the City of Olathe, Johnson County, Kansas.

ALSO INCLUDING:

All adjacent Right-of-Way.

[Balance of page intentionally left blank]

**EXHIBIT B**

**FORM OF CERTIFICATE OF COSTS**

**CERTIFICATE OF COSTS**

TO: City of Olathe, Kansas  
Attention: City Manager

Re: 114-126 N. Cherry Street CID Project

*Terms not otherwise defined herein shall have the meaning ascribed to such terms in that certain Development Agreement (114-126 N. Cherry Street), dated as of December 11, 2024 (the "Agreement") between the City of Olathe, Kansas (the "City") and Cherry Santa Fe, LLC (the "Developer").*

In connection with the Agreement, the undersigned hereby states and certifies that, to his or her actual knowledge:

1. Each item listed on *Schedule 1* hereto is a [CID Cost and was][cost] incurred in connection with the construction of the Project.

2. These [CID Costs][costs] have been paid by the Developer and are reimbursable [from the CID Fund][from the City Loan] under [the CID Act and] the Agreement, and *Schedule 1* requests reimbursement of each such cost from either the CID Fund or the City Loan.

3. Each item listed on *Schedule 1* has not previously been paid or reimbursed from money derived from the CID Fund or City Loan, and no part thereof has been included in any other certificate previously filed with the City.

4. There has not been filed with or served upon the Developer any notice of any lien, right of lien or attachment upon or claim affecting the right of any person, firm or corporation to receive payment of the amounts stated in this request, except to the extent any such lien is being contested in good faith,

5. All necessary permits and approvals required for the work for which this certificate relates were issued and were in full force and effect at the time such work was being performed.

6. All work for which payment or reimbursement is requested has been performed in a good and workmanlike manner and in accordance with the Agreement.

7. The Developer is not in default or breach of any term or condition of the Agreement, and no event has occurred and no condition exists which constitutes a Developer Event of Default under the Agreement.

8. All of the Developer's representations set forth in the Agreement remain true and correct as of the date hereof.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

**CHERRY SANTA FE, LLC**

By: \_\_\_\_\_  
Printed Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Approved for Payment this day of \_\_\_\_\_, 20\_\_\_\_.

CITY OF OLATHE, KANSAS

By: \_\_\_\_\_  
Title: \_\_\_\_\_



## EXHIBIT C

### FORM OF CERTIFICATE OF SUBSTANTIAL COMPLETION

*Pursuant to **Section 4.07** of the Agreement, the City shall, within thirty (30) days following delivery of this Certificate, carry out such inspections as it deems necessary to verify to its reasonable satisfaction as to the accuracy of the certifications contained in this Certificate.*

### CERTIFICATE OF SUBSTANTIAL COMPLETION

The undersigned, Cherry Santa Fe, LLC (the “Developer”), pursuant to that certain Development Agreement, dated as of December 11, 2024, between the City of Olathe, Kansas (the “City”) and the Developer (the “Agreement”), hereby certifies to the City, as follows:

1. That as of \_\_\_\_\_, 20\_\_\_\_, the construction, renovation, repairing, equipping and constructing of the Project (as such term is defined in the Agreement) has been substantially completed in accordance with the Agreement.

2. The Project has been completed in a workmanlike manner and in substantial accordance with the Construction Plans (as those terms are defined in the Agreement).

3. Lien waivers for the Project have been obtained, or, to the extent that a good faith dispute exists with respect to the payment of any construction cost with respect to the Project, Developer has provided the City with a bond or other security reasonably acceptable to the City.

4. This Certificate of Substantial Completion (this “Certificate”) is accompanied by (a) the project architect’s certificate of substantial completion on AIA Form G-704 (or the substantial equivalent thereof), a copy of which is attached hereto as Appendix A and by this reference incorporated herein), certifying that the Project has been substantially completed in accordance with the Agreement; and (b) a copy of the Temporary Certificate(s) of Occupancy issued by the City Building Official (if applicable) with respect to the Project.

5. This Certificate of Substantial Completion is being issued by the Developer to the City in accordance with the Agreement to evidence the Developer’s satisfaction of all obligations and covenants with respect to the Project.

6. The City’s acceptance of this Certificate shall evidence the satisfaction of the Developer’s agreements and covenants to construct the Project described above.

This Certificate is given without prejudice to any rights against third parties which exist as of the date hereof or which may subsequently come into being.

Terms not otherwise defined herein shall have the meaning ascribed to such terms in the Agreement. Upon the request by either Party, this Certificate shall be recorded in the real estate records of Johnson County, Kansas.

IN WITNESS WHEREOF, the undersigned has hereunto set his/her hand this \_\_\_\_\_ day  
of \_\_\_\_\_, 20\_\_\_\_\_.

**CHERRY SANTA FE, LLC,**  
a Kansas limited liability company

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

ACCEPTED:

CITY OF OLATHE, KANSAS

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

(Insert Legal Description)

**EXHIBIT D**

**PROJECT BUDGET\***

| <b>Item</b>              | <b>Total Cost</b>  | <b>CID Eligible Costs</b> |
|--------------------------|--------------------|---------------------------|
| <b>Purchase Price</b>    | \$6,100            | \$-                       |
| <b>Hard Costs</b>        |                    |                           |
| General Conditions       | \$259,093          | \$-                       |
| Survey                   | \$3,500            | \$-                       |
| Demolition               | \$85,333           | \$85,333                  |
| Concrete                 | \$70,514           | \$70,514                  |
| Masonry                  | \$209,320          | \$209,320                 |
| Steel                    | \$261,232          | \$261,232                 |
| Rough Carpentry          | \$425,000          | \$425,000                 |
| Roofing                  | \$109,400          | \$109,400                 |
| Sealants                 | \$22,940           | \$22,940                  |
| Doors                    | \$139,500          | \$139,500                 |
| Glass                    | \$94,595           | \$94,595                  |
| Drywall Systems          | \$185,350          | \$185,350                 |
| Painting                 | \$28,200           | \$28,200                  |
| Specialties              | \$26,000           | \$26,000                  |
| Elevator                 | \$130,000          | \$130,000                 |
| Fire Sprinkler           | \$15,390           | \$15,390                  |
| Plumbing                 | \$400,271          | \$400,271                 |
| HVAC                     | \$152,880          | \$152,880                 |
| Electrical               | \$190,755          | \$190,755                 |
| Asphalt                  | \$30,440           | \$30,440                  |
| Fencing                  | \$21,000           | \$21,000                  |
| Landscaping              | \$53,000           | \$53,000                  |
| Insurance                | \$41,349           | \$-                       |
| Permit                   | \$12,821           | \$-                       |
| OH&P                     | \$224,375          | \$-                       |
| <b>Tenant Investment</b> | \$2,171,800        | \$-                       |
| <b>Soft Costs</b>        | \$1,099,720        | \$-                       |
| <b>Contingency</b>       | \$539,808          | \$-                       |
| <b>Total</b>             | <b>\$7,009,686</b> | <b>\$2,651,120</b>        |

**EXHIBIT E**

**PROJECT SCHEDULE**

| <b><u>Date</u></b>                                      | <b><u>Milestone</u></b>  |
|---|--|
| Within 30 days of the Effective Date                    | Developer to meet with City Development Review Committee regarding design of Project.                    |
| Within 210 days of the Effective Date                   | Closing (as defined in Real Estate Contract).  |
| Within 60 days of Closing                               | Deadline for Developer to submit building permit and engage contractor for construction of Project.      |
| Within 60 days of City's issuance of building permit    | Deadline for Developer to commence construction of Project.  |
| Within 240 of Developer's commencement of construction. | Deadline for Developer to submit Certificate of Substantial Completion and commence operation of Project |

**EXHIBIT F**

**CONCEPTUAL RENDERING**

# COUNTY SQUARE COMMONS



## **EXHIBIT G**

### **MAINTENANCE PLAN**

Developer will carefully maintain (or cause to be maintained) the Property and all structures, buildings, appurtenances, screening fences, parking areas and drives, pylon and entry signs, landscaping and other improvements of whatever nature thereon in a safe, clean and orderly manner, in condition and repair consistent with other similarly situated restaurants in the Kansas City metropolitan area, and all at times in accordance with the City's Unified Development Ordinance, and other Applicable Laws and Requirements, including, but not limited to, the implementation of the maintenance procedures set forth below. Commencing upon the Substantial Completion of the Project and continuing for the term of the Agreement, Developer's maintenance of the Property will include the following:

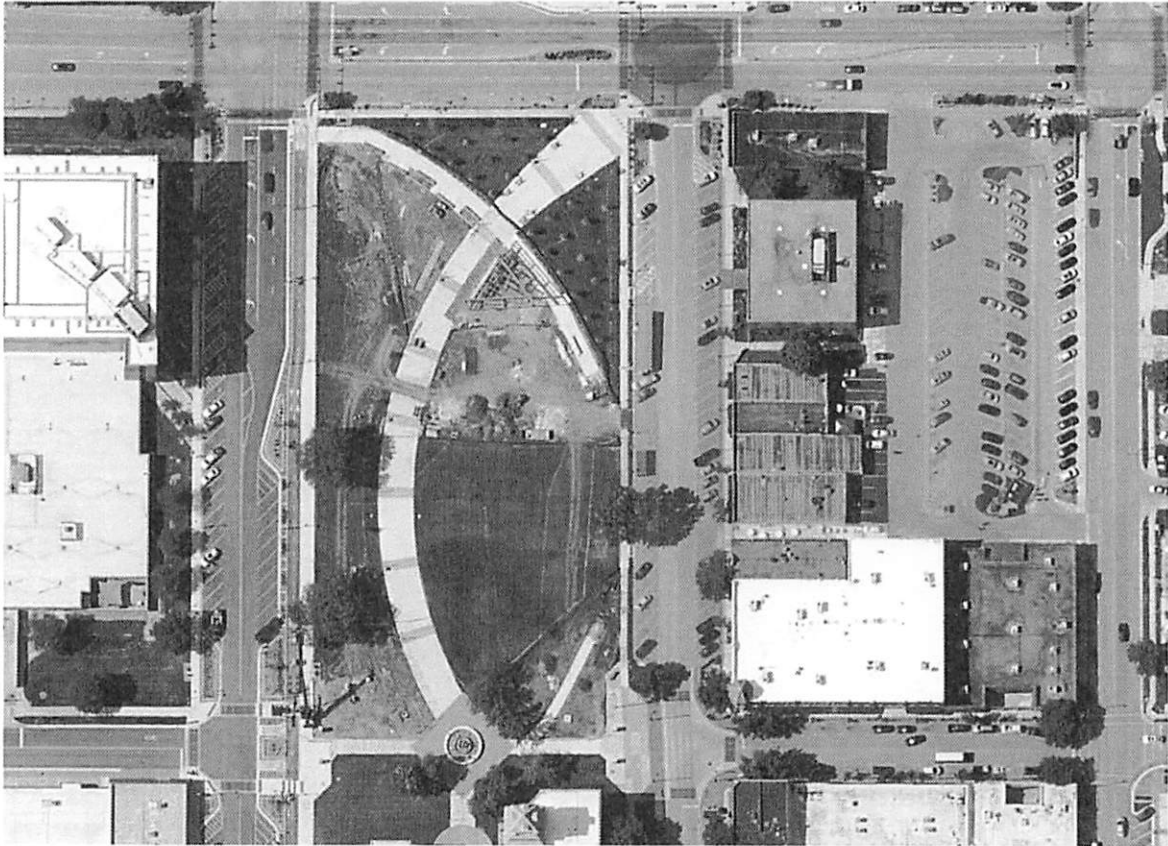
1. Developer will act as property manager or engage a third-party property management company (the "Property Manager") to oversee the management of the Property. Any third-party Property Manager will be a reputable property management company qualified to implement the maintenance obligations described herein in a diligent and timely manner;
2. Once installed, all landscaping on the Property will be maintained in a neat and adequate manner, including, without limitation, mowing, trimming of bushes and trees, replacement of dead bushes and trees, watering as needed, and other similar maintenance and upkeep;
3. All parking areas, curbs, and drives and access on the Property will be paved with an impervious surface equal to asphalt or concrete and maintained in a sightly and well-kept condition at all times, free from excessive potholes. Each parking space provided on the Property, if any, will be designated by striping painted on the paved surfaces and will be adequate in size in accordance with the Unified Development Ordinance and Municipal Code, and such striping will be repainted as reasonably needed;
4. All façade improvements on the Property will be maintained in a sightly and well-kept condition at all times, including repair and replacement as deemed necessary by Developer (in its reasonable discretion) in accordance with the repair and replacement provisions set forth below;
5. All lighting and pylon- and entry-signage on the Property will be maintained in a sightly and well-kept condition at all times, including repair and replacement of the same as necessary to keep the Property well-lit in accordance with the Unified Development Ordinance, Municipal Code, and the repair and replacement provisions set forth below;
6. Developer will cause the Project to be maintained, preserved and kept in good repair and working order in a safe condition, consistent at all times with other similarly situated restaurants in the Kansas City metropolitan area and the maintenance procedures set forth herein; and
7. Developer will make all repairs renewals, replacements and improvements to the Property necessary for the safe, efficient, and advantageous conduct of its business and operations




upon the Property; provided, however, that, with respect to replacements in particular, Developer will exercise its reasonable judgment as to whether any given improvement(s) may be repaired in such manner as to so maintain, preserve and keep such improvement(s) in good repair and working order in a safe condition, and will only be required to replace such improvement(s) following the expiration of their useful life at such time as they can no longer be repaired, in Developer's reasonable discretion, in such manner as to maintain, preserve and keep the same in good repair and working order in a safe condition. Notwithstanding the foregoing or anything in this Agreement to the contrary, nothing herein will preclude Developer from removing or demolishing any building(s) or improvement(s) if, in its reasonable judgment, such removal or demolition is desirable in the conduct of its business.



EXHIBIT H

DEPICTION OF PARKING AND ALLEYWAYS



-  PARKING
-  SOUTH ALLEY
-  EAST ALLEY