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Polk County Iowa
JULIE M. HAGGERTY RECORDER
File# 2015-00147078

BK 15776 PG 285-305

RETURN TO:

RETURN TO: City Clerk's Office, 400 Robert D. Ray Drive, Des Moines, Iowa 50309-1891

Prepared by Glenna Frank, Assist. City Attorney; 400 Robert D. Ray Dr., Des Moines IA 50309 283-4130

Taxpayer: No Change

**Title of Document: Urban Renewal Development Agreement with Confluence on Third,
LLC**

Grantor-City of Des Moines, Iowa

Grantee- Confluence on Third, LLC

Legal Description-Page 2

URBAN RENEWAL DEVELOPMENT AGREEMENT

METRO CENTER URBAN RENEWAL AREA

By and Between

CITY OF DES MOINES, IOWA

and

CONFLUENCE ON THIRD LLC

Approved by City Council:
Date: October 12, 2015
Roll Call No. 15- 1733

Exhibits:

- “A” – Conceptual Development Plan
- “B” – Not Used.
- “C” – Declaration of Covenants
- “D” – Promissory Note (Forgivable)
- “E” – Release of Indebtedness

NOTE: This Agreement and Exhibits “C”, and “E” upon completion and release, are intended to be recorded in the land records of the Polk County Recorder. This Agreement and all exhibits hereto shall be on file and available for public inspection in the office of the City Clerk, at City Hall, City of Des Moines, Iowa.

This URBAN RENEWAL DEVELOPMENT AGREEMENT, including Exhibits, each of which is attached hereto and by this reference made a part hereof (the Agreement and Exhibits are together hereinafter called the "Agreement"), is made on or as of the 12th day of October, 2015, by and between the CITY OF DES MOINES, IOWA, a municipal corporation, having its offices at City Hall, 400 Robert D. Ray Drive, Des Moines, Iowa (hereinafter called "City"), acting pursuant to Chapter 15A of the Code of Iowa, and **Confluence on Third LLC**, a Delaware Limited Liability Company having its principal office at 1964 W. Wayzata Boulevard, Suite 200, Long Lake, MN 55356 (hereinafter called "Developer").

WITNESSETH:

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

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

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

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

WHEREAS, City has undertaken programs to create new jobs and income and retain existing jobs and income that would otherwise be lost, by stimulating economic revitalization of the downtown Des Moines area; making use of under-utilized areas of the City of Des Moines; removing conditions which have prevented normal development of the land by private enterprise; and avoiding stagnant and unproductive conditions of land which is potentially useful and viable for contributing to the public health, safety and welfare of residents within the City of Des Moines; and,

WHEREAS, the City Council of the City has established a goal of achieving, through new construction, rehabilitation or adaptive re-use, 10,000 additional housing units in downtown Des Moines, in order to further promote the creation of new jobs and income and the retention of existing jobs and income that would otherwise be lost; and,

WHEREAS, Developer proposes to construct a multi-family residential building, containing not less than four (4) stories and approximately 211 units of finished residentially assessed living units, and on-site, underground parking improvements containing approximately 187 parking spaces on property generally located between Vine Street and Market Street, and between 2nd Street and 3rd Street ("Property") and more specifically described as follows:

Lots 1 through 8 in Block 29 in the Original Town of Fort Des Moines, an Official Plat, now included in and forming a part of the City of Des Moines, Iowa;

and

All of the Vacated North/South alley right-of way, and all of the Vacated East/West Alley right-of-way, including intersection of both alleys, in Block 29, Fort Des Moines, an Official Plat, all now included in and forming a part of the City of Des Moines, Polk County, Iowa

; and

WHEREAS, the Developer's obligations under this Agreement to construct the Improvements furthers the City's objectives to preserve and create an environment which will protect the health, safety and general welfare of City residents and maintain taxable values within the City, to encourage the development of affordable and market-rate housing in decent, safe and sanitary conditions in attractive settings to serve employees and other people who would like to live, work and retain employment in the downtown area, to provide a variety of locations to serve the different housing markets within the City, to provide for the orderly expansion of downtown Des Moines as a retail, financial and business center of the metropolitan area and to encourage the coordinated development of parcels and structures to achieve efficient building design and the provision of adequate parking; and,

WHEREAS, the construction upon the Property will also further the objectives of the Urban Renewal Plan to maintain taxable values within the Urban Renewal Area, and to preserve and create an environment which will protect the health, safety and general welfare of City residents; and,

WHEREAS, the economic development incentives for the development of the Improvements shall be provided by the City to Developer pursuant to the Urban Renewal Law and Chapter 15A of the Code of Iowa and Developer's obligations under this Agreement to construct the Improvements will generate the following public gains and benefits: (i) it will provide a range of housing in decent, safe and sanitary conditions in attractive settings to serve employees and other people who would like to live in the downtown area; (ii) it will encourage further private investment and will attract and retain residents and businesses in the downtown area of the City of Des Moines to reverse the pattern of disinvestment and declining resident population; (iii) it will further the City's efforts to create and retain job opportunities within the downtown area that might otherwise be lost; and (iv) it will advance the improvement and redevelopment of the downtown area, in accordance with the Urban Renewal Plan; and,

WHEREAS, the development of the Improvements is a speculative venture and the public gains and benefits of anticipated job creation and retention from the construction and resulting workforce housing and redevelopment opportunities would not occur without the economic incentives provided by this Agreement and the public gains and benefits are warranted in comparison to the amount of economic incentives; and,

WHEREAS, City believes that the redevelopment of the Property pursuant to this Agreement, and the fulfillment generally of this Agreement, are in the vital and best interests of City and the health, safety, morals, and welfare of its residents, and in accord with the public purposes and provisions of the applicable state and local laws and requirements under which the Project has been undertaken, and warrant the provision of the economic assistance set forth in this Agreement.

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

ARTICLE 1.
NOT USED.

ARTICLE 2.
**CONSTRUCTION OF IMPROVEMENTS AND MINIMUM
DEVELOPMENT REQUIREMENTS FOR IMPROVEMENTS**

Section 2.1. Duty to Construct Improvements. Developer agrees, subject to the terms of this Agreement, to undertake the redevelopment of the Property by timely constructing the following improvements (collectively referred to as the "Improvements"):

- 1) a multi-family residential building, in conformance with a City-approved site plan and the Conceptual Development Plan as described herein;
- 2) on-site, underground parking improvements, in conformance with a City-approved site plan and the Conceptual Development Plan as described herein;
- 3) streetscape improvements in accordance with Chapter 82, Section 215 of the City of Des Moines Site Plan Ordinance, Parkway Plantings Landscape Standards.

The Improvements shall be constructed in conformity with this Agreement, the City's land use requirements, the approved Conceptual Development Plan and all applicable State and local laws and regulations.

Section 2.2. Time for Completion of Improvements. A. Subject to Section 6.2, Developer shall commence construction of the Improvements by December 1, 2015, and shall complete construction of the Improvements no later than December 31, 2017. Construction of the Improvements, once commenced, shall be diligently pursued to completion.

Section 2.3. Progress Reports. From commencement of construction of the Improvements until construction has been completed, Developer shall make reports, in such detail and at such times as may reasonably be requested by City, as to the actual progress of Developer with respect to such construction and installation.

Section 2.4. Access to Property. During construction of any of the Improvements and prior to expiration of the Declaration of Covenants, Developer shall permit City's representatives access to the Improvements at all reasonable times which City reasonably deems necessary for the purposes of this Agreement. No compensation shall be payable nor shall any charge be made in any form by any party for the access provided for in this Section.

Section 2.5. Minimum Development Requirements for the Property. Developer shall construct the Improvements to the Property in conformity with the Conceptual Development Plan and other required City approvals, incorporating therein the following Minimum Development Requirements:

A. Building. The Improvements shall include a building intended for residential use containing approximately 240,000 square feet and in conformance with a City-approved site plan and the Conceptual Development Plan as described herein.

B. Roof. Any rooftop mechanical structures, elevator penthouses and equipment, including antennas, receivers and other similar communications devices, shall be concealed from all ground level viewpoints, shall be constructed away from the perimeter of the buildings and shall be incorporated into the bulk of the building in such a manner to minimize visual impact and achieve compatible building design, except as otherwise provided in a City-approved Conceptual Development Plan.

C. Building Materials. The building shall be inviting and attractive from all directions and shall be constructed of durable and good quality materials that are easily maintained. Exterior materials may include stone, brick or other types of masonry units, pre-cast or poured concrete, tile, metal, glass, or any combination of the above materials, and as otherwise provided for in a City-approved Conceptual Development Plan. Exterior wall insulation finish systems including dryvit shall not be permitted. The colors of exterior materials shall be predominately neutral and the natural character of the materials shall be clearly expressed. The style, color and type of exterior materials shall complement existing buildings and structures in the area.

D. Sidewalk, Streetscape, Landscaping. The Improvements shall include new paved sidewalk, streetscape and landscape improvements on all street right-of-way adjacent to the property lines of the Property. All sidewalk, streetscape and landscape improvements shall be constructed or installed in accordance with the requirements of the "Des Moines Landscape Design Standards", except as otherwise provided for in a City-approved Conceptual Development Plan. All sidewalk, streetscape and landscape improvements shall be planned and coordinated as part of the Site Plan and Conceptual Development Plan review process.

E. Equipment and Trash Enclosures. All equipment and trash containers shall be set back a sufficient distance from the street right-of-way and shall be adequately screened.

F. Signage. All signage shall comply with the "C-3R" Central Business District Mixed-Residential Zoning District regulations and shall be appropriate to and compatible with the architecture of the building and the surrounding area. A comprehensive graphics package for exterior signs and images for the Property shall be prepared as part of the submitted Conceptual Development Plan.

G. Lighting. All exterior lighting must be designed in a manner which does not intrude upon existing and planned residential uses in the area. A comprehensive lighting plan that indicates lighting design layout and levels of illumination shall be prepared as part of the submitted Conceptual Development Plan.

H. Parking. The Improvements shall include a parking spaces in conformance with a City-approved site plan and Conceptual Development Plan as described herein.

ARTICLE 3.

CONCEPTUAL DEVELOPMENT PLAN

Section 3.1. Site Plan Review Pre-application Conference. At the earliest practical date, Developer shall submit to the Community Development Department of City a request for a pre-application conference for the Site Plan for the Property pursuant to the Site Plan Review process as required by City of Des Moines Municipal Code Section 82-207. Such pre-application conference shall be held within fifteen (15) days of the request and Developer and its Architect or a designated representative shall participate in the conference. The review required by the Site Plan Ordinance (Des Moines Municipal Code §82-206 to §82-219) is a separate review process from the review of the Conceptual Development Plan provided for in this Agreement. Approval of a plan pursuant to one does not constitute approval for purposes of the other.

Section 3.2. Conceptual Development Plan.

A. The approved Conceptual Development Plan for the Improvements is attached hereto as Exhibit "A". The Conceptual Development Plan establishes the location and design of the Improvements.

B. The Conceptual Development Plan, as originally approved and as may be amended, shall include conceptual site plans, schematic signage and lighting plans, detailed building elevations for each building face, floor plans for all stories, typical floor plans for each floor and streetscape and landscaping plans.

C. The Conceptual Development Plan shall comply with the following requirements:

- 1) The Improvements must satisfy the minimum requirements set forth in Article 2.
- 2) The Conceptual Development Plan must satisfy the City's land use requirements and all applicable State and local laws and regulations.

Section 3.3. Changes to Conceptual Development Plan. All material changes to the approved Conceptual Development Plan are subject to City's approval, which shall not be unreasonably withheld or delayed. If Developer desires to make any material change to the approved Conceptual Development Plan, Developer must submit the proposed change to City. If the Conceptual Development Plan, as modified by the proposed change, conforms to the requirements of Section 3.2, City shall approve the proposed change by notifying Developer in writing. Any such change to the Conceptual Development Plan shall be deemed approved by City unless it is rejected, in whole or in part, by written notice to Developer within thirty (30)

days after City receives such proposed change. City will make this a priority and shall endeavor to promptly complete its review of any such change. For purposes of this Section, "material changes" include any change that affects the minimum development requirements as defined above in Section 2.5, and/or any change that affects the Improvements as set forth in the City-approved Conceptual Development Plan.

Section 3.4. Building Permits/Construction Permits. The Construction Plans submitted by Developer for the Improvements shall be in substantial compliance with the approved Conceptual Development Plan. City may withhold approval of a building permit if the Construction Plans do not substantially comply with the applicable approved Conceptual Development Plan.¹ In the event of a conflict between the approved Conceptual Development Plan and the Construction Plans, the Conceptual Development Plan shall be controlling.

Section 3.5. Certificate of Completion.

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

B. Promptly upon receipt of Developer's notification of request for Certificate of Completion, City shall inspect the Improvements. If City determines that Developer has completed the necessary portion of the Improvements in substantial compliance with the provisions of this Agreement and the approved Construction Plans, City shall issue a "Certificate of Completion" so certifying. Issuance of the Certificate of Completion shall not be unreasonably withheld or delayed by City. If City determines that Developer has not completed the necessary portion of the Improvements in substantial compliance with the provisions of this Agreement and the approved Construction Plans, City shall, within thirty (30) days of receiving Developer's notification of completion, provide Developer with a written statement of the basis for City's determination which specifies the actions to be performed by Developer in order to obtain the certification.

C. The determination by City regarding completion of any part of the Improvements is independent of any required determination by City regarding the issuance of an Occupancy Permit pursuant to the Building Code of City. The issuance of an Occupancy Permit for any portion of the Property shall not serve as a substitute for the applicable Certificate of Completion referenced in this Section.

¹ The Permit & Development Staff responsible for the administration of building permits are NOT responsible for verifying that an application for a building permit conforms with the requirements of this Agreement. If there is any doubt concerning whether the construction plans for any portion of the Improvements conforms with the Conceptual Development Plan, the Developer should immediately bring that question to the attention of the City Office of Economic Development.

D. The City may withhold issuance of the Certificate of Completion until Developer has satisfied the following conditions precedent to the advancement of the Economic Development Assistance pursuant to Section 5.3, and is otherwise in compliance with the terms of this Agreement:

- 1) Developer has executed and recorded a Declaration of Covenants in the form attached hereto as Exhibits "C".
- 2) Developer has supplied to City a title opinion from an independent attorney based upon an abstract which identifies that the Declaration of Covenants has been properly executed and recorded in the land records in the Polk County Recorder, and have priority over all other liens and encumbrances as if such documents had been filed prior in time.

Section 3.6. Effect of Issuance. A. Upon issuance of the Certificate of Completion for the Improvements, the obligations and covenants contained in this Agreement with respect to the construction of the portion of the Improvements covered by the Certificate, and the dates for the beginning and completion thereof, shall be satisfied and terminated. However, all other obligations and covenants contained in this Agreement, including completion of all remaining work with respect to the Improvements, shall remain in full force. Developer may utilize the Certificate of Completion only as evidence of compliance with or satisfaction of Developer's construction obligations under this Agreement with respect to the portion of the Improvements covered by the Certificate.

B. The Certificates of Completion shall be in recordable form to allow filing among the land records of the Polk County Recorder's Office.

C. Issuance of the Certificate of Completion for the Improvements shall further prompt forgiveness of the Forgivable Loan, and release of the note associated therewith, as described in Article 5 herein below.

ARTICLE 4 COVENANTS

Section 4.1. Representations as to Redevelopment. Developer recognizes and acknowledges:

- 1) The importance of the development of the Property to the general welfare of the community as a whole;
- 2) The substantial public aid that has been made available by City for the purpose of making such redevelopment possible; and
- 3) The qualifications and identity of Developer are of particular concern to the community and City and are an important element in City's decision to enter into this Agreement.

Section 4.2. Declaration of Covenants. Developer shall promptly execute and record a Declaration of Covenants in the form of Exhibit "C" attached hereto.

ARTICLE 5

ECONOMIC DEVELOPMENT ASSISTANCE

Section 5.1. Basis for Assistance. In consideration of Developer's obligation to construct the Improvements within the Project Area in accordance with this Agreement and in consideration of the economic development and employment opportunities that will be retained and created in and around the City of Des Moines as a result of such undertaking, City shall accommodate the conveyance of the Property as described above, and to provide the tax abatement or Economic Development Grant, as applicable, and a Forgivable Loan (collectively "Economic Development Assistance") identified in this Article.

Section 5.2. Urban Revitalization Tax Abatement.

A. The Property is situated within the City-Wide Urban Revitalization Area, and within the portions thereof designated as the Targeted Residential Development Area. The term of the City-Wide Urban Revitalization Plan has been extended to include the value added by improvements commenced by December 31, 2015 and completed by December 31, 2016. City hereby acknowledges and agrees that if construction of the residential unit improvements in the Property is commenced prior to December 31, 2015, then the percentage of valued added improvements completed by December 31, 2016, and completed in compliance with this Agreement, are eligible under the City-Wide Urban Revitalization Plan to receive an exemption from taxes on the actual taxable value added by the construction of such improvements under Residential Tax Abatement Schedule 4A - 100% for 10 years, provided the Improvements are completed by Developer in substantial conformance with Article 2 and an application for tax abatement is timely filed by February 1, 2017, as required by I.C. §427B.4.

B. In the event that prior to substantial completion of the Improvements, the City (i) amends the City-Wide Urban Revitalization Plan to reduce the tax abatement schedule applicable to the Improvements to a tax abatement schedule of less than tax abatement for a ten-year period on one hundred percent (100%) of the assessed value added by these Improvements as allowed by Iowa Code § 404.3(4)(2015); (ii) amends the City-Wide Urban Revitalization Plan to exclude the Property from property that is eligible for any tax abatement; (iii) repeals the City-Wide Urban Revitalization Plan and does not replace it with any other urban revitalization plan that allows the Improvements to the Property to be eligible for tax abatement for a ten-year period on one-hundred percent (100%) of the assessed value added by these Improvements as allowed by Iowa Code § 404.3(4)(2015), or (iv) if the Developer while diligently pursuing completion of the project is delayed due to circumstances outside the Developer's control that prevents the project from qualifying under the exiting terms of the City-Wide Urban Revitalization Plan for the ten-year period one-hundred percent (100%) tax abatement schedule, then subject to Sections 5.4 and 5.5 below, the City shall pay to the Developer an Economic Development Grant for Improvements on the Property that is ineligible to receive tax abatement

for a ten-year period on 100% of the assessed value added by the Improvements to the Property as allowed by § 404.3(4)(2015), to be advanced as set forth in Section 5.3 below.

C. Each of the semi-annual installments on the Economic Development Grant shall be paid to the Developer in one aggregate payment. City is not required to recognize or honor any attempted assignment of the Economic Development Grant that does not allow the semi-annual advancements on the Grant to be paid in one aggregate semi-annual payment.

Section 5.3. Economic Development Grant.

A. Following completion of the Improvements in substantial conformance with Article 3, the Developer shall apply for urban revitalization tax abatement (herein referred to as the "Application") on the taxable value added to the Property by the Improvements therein, which Application shall be timely filed by February 1, 2017 in accordance with this Section and Article.

B. Full Abatement. If, as a result of the Application, a portion of the assessed value of the Improvements on the Property is exempt from taxation (is abated) in that fiscal year, then no advancement on the Economic Development Grant shall be due or payable for the Property.

C. No Abatement. If no part of the taxable value added to the Property by the Improvements is exempt from taxation (is abated) in that fiscal year, then the City shall pay to Developer a grant ("Economic Development Grant") in installments as follows:

- 1) Amount. The installments due in each fiscal year on the Economic Development Grant shall be in an amount equal to the portion of the property taxes payable in that fiscal year that are attributable to the incremental value added by the Improvements to the Property, which is equal to the total of the taxable value of the Improvements only, excluding land value, on the Property as of January 1, 2017.
- 2) The Economic Development Grant shall be paid by City solely from the special fund financed by the division of revenue pursuant to Iowa Code §403.19(2) from taxes levied on the Improvements to the Property in the Urban Renewal Area. For purposes of calculating each installment of the Economic Development Grant the millage levies for protected debt service for all political subdivisions will be subtracted from the gross millage rate payable in that fiscal year².

² In calculating the amount of each grant installments the millage rate to be used is formulated by taking the gross millage rate less all protected debt levies. For example Fiscal Year 2015-2016 the Gross Millage Rate is \$48.97311 per \$1,000 less the total protected levies of \$8.9193500 equals a tax levy to be used in calculating the economic development grant installment of \$40.0537600 per \$1,000 of new Improvement valuation.

- 3) Timing. The advancements on the Economic Development Grant for the Improvements to the Property shall be paid in twenty semi-annual installments each November 15th and May 15th, commencing on November 15, 2018.³

Section 5.4. Conditions Precedent.

A. The City's obligation to advance the Forgivable Loan shall be subject to the following conditions precedent:

- 1) Developer has executed, for recording, a Declaration of Covenants in the form attached hereto as Exhibit "C".
- 2) Developer is not in breach of any provisions of this Agreement, the Declaration of Covenants, or the Promissory Note, and any prior default has been cured or remedied in conformance with in Article 6.

B The City's obligation to advance any and all installments of the Economic Development Grant, if applicable, shall be subject to the following conditions precedent:

- 1) Developer has been issued a Certificate of Completion in accordance with Article 3 of this Agreement.
- 2) Except as provided in Section 6.2, no Economic Development Grant shall be allowed or paid for any Improvements that are not substantially completed by December 31, 2017.
- 3) Developer is not in breach of any provisions of this Agreement, the Declaration of Covenants, or the Promissory Note, and any prior default has been cured or remedied in conformance with in Article 6.
- 4) *Annual Reporting.* Developer must have filed the Annual Report as required by Section 5.5.
- 5) *Maintenance.* The Improvements have been maintained in good condition and repair in substantial conformance with the approved Conceptual Development Plan and Construction Plans. If the Improvements are materially damaged by fire or other casualty, repairs to restore the Improvements to their former condition in substantial conformance with the approved Conceptual Development Plan and Construction Plans shall be commenced within ninety (90) days and shall be diligently pursued to completion.

³ Assuming the Project is substantially complete for issuance of the Certificate of Completion by December 31, 2017, then on:

1-1-2018	First fully assessed for property taxes
FY 2019/20	Taxes first levied upon residential unit improvements.
09/15/2019	Annual report due identifying amounts of advancements in current fiscal year.
09/30/2019	First semi-annual installment of taxes due on Improvements.
11/15/2019	First semi-annual advancement due on Economic Development Grant.
03/31/2020	Second semi-annual installment of taxes due on Improvements.
05/15/2020	Second semi-annual advancement due on Economic Development Grant.
05/15/2029	Final semi-annual advancement due on Economic Development Grant.

Section 5.5. Annual Reporting Requirements. Commencing on September 15, 2018, and continuing each September 15th until all installments on the Economic Development Grant have been paid, Developer shall file a report (herein called the Annual Report) with the City containing the following information:

- 1) *Property taxes.* A statement identifying the amount of property taxes due and payable upon the Property and upon the Improvements thereon in the fiscal year that includes the due date of the Annual Report, and the allocation of those taxes between the value of the land and the value of the Improvements.
- 2) *Installment Amounts.* The calculation of the amount of the annual installment on the Economic Development Grant due from City to Developer pursuant to this article in the fiscal year that includes the due date of the Annual Report. Said calculation shall be subject to verification by the City, and the City shall make the ultimate determination of the installment amount in accordance with this Agreement.
- 3) *Verification.* A statement signed by an authorized officer of Developer, verifying that the information contained in the Annual Report is true and accurate.

Section 5.6. Forgivable Economic Development Loan.

A. Subject to Section 5.3, the City shall advance an economic development forgivable loan (herein referred to as the "Forgivable Loan") to Developer in the amount of Two-Hundred Eighty-Thousand and No/100 U.S. Dollars (\$280,000.00), of which shall be advanced and applied exclusively in payment of the purchase price for the Alleys. The Forgivable Loan shall draw interest at the rate of 6.0% from advancement until repaid or forgiven as provided in subsection (B) below.

B. The balance of the Forgivable Loan shall be forgiven if Developer constructs the Improvements described in Article 2, and qualifies for the issuance of the certificate of completion contained in Section 3.5.

C. The Forgivable Loan and its additional terms are set forth in the Promissory Note attached hereto as Exhibit "D". Notwithstanding anything to the contrary in this Agreement, the City reserves the right to enforce the terms of the Promissory Note and demand repayment of the Forgivable Loan, including pursuing legal remedies to effect such repayment, in the event of default of this Agreement by Developer.

D. Simultaneous with its issuance of a Certificate of Completion in accordance with Article 3, Section 3.6.C., the City shall promptly record a Release of Indebtedness in substantially the same form as Exhibit "E" attached.

Section 5.7. Source of Funding.

A. If applicable, the Economic Development Grant shall be paid by City solely from the special fund financed by the division of revenue pursuant to Iowa Code

§403.19(2) from taxes levied in the Urban Renewal Area. The obligations of City under this Agreement shall not constitute a general obligation of the City.

B. The City represents, warrants and agrees that for so long as Developer is not in default under this Agreement and the City is obligated to pay the installments on the Economic Development Grant in accordance with the terms of this Agreement:

- 1) City shall not repeal the designation of the Property or any part thereof as being within an urban renewal area pursuant to Iowa Code §403.5.
- 2) City shall not repeal Ordinance No. 15,012, nor amend such ordinance in any manner that impairs the City's ability to pay the installments on the grants as contemplated by this Agreement.
- 3) That the City will timely certify to Polk County each installment on the grants for payment from the special fund for the Metro Center Urban Renewal Project in accordance with Iowa Code §403.19(2).

Section 5.8. Non-Appropriation.

A. Notwithstanding anything in this Agreement to the contrary, the obligation of the City to pay any installment of the Economic Development Grant shall be an obligation limited to currently budgeted funds, and not a general obligation or other indebtedness of the City or a pledge of its full faith and credit under the meaning of any constitutional or statutory debt limitation, and shall be subject in all respects to the right of non-appropriation reserved by the City Council as provided in this Section. City may exercise its right of non-appropriation as to the amount of the installments to be paid during any fiscal year during the term of this Agreement without causing a termination of this Agreement. The right of non-appropriation shall be exercised only by resolution affirmatively declaring the City's election to non-appropriate funds otherwise required to be paid to Developer in the next fiscal year under this Agreement.

B. In the event the City Council of City elects to not appropriate sufficient funds in the budget for any future fiscal year for the payment in full of the installments on the grants due and payable in that fiscal year, then: i) the City shall have no further obligation to Developer for the payment of all installments due in the next fiscal year which cannot be paid with the funds then appropriated for that purpose; and, ii) during that same fiscal year Developer shall be released from all obligations under this Agreement and under the Declaration of Covenants.

C. The right of non-appropriation reserved to the City in this Section is intended by the parties, and shall be construed at all times, so as to ensure that the City's obligation to pay future installments on the Economic Development Grant shall not constitute a legal indebtedness of the City within the meaning of any applicable constitutional or statutory debt limitation prior to the adoption of a budget which appropriates funds for the payment of that

installment or amount. In the event that any of the provisions of this Agreement are determined by a court of competent jurisdiction to create, cause, or result in the creation of, such a legal indebtedness of the City, the application and enforcement of any such provision(s) shall be deemed suspended as of the date of such determination, and the Agreement shall at all times be construed and applied in such a manner as will preserve the foregoing intent of the parties, and no event of default shall be deemed to have occurred as a result of the suspension of any such provision(s). If any provision of this Agreement is so suspended, the suspension shall not affect other provisions or application of this Agreement which can be given effect without the suspended provision. To this end the provisions of this Agreement are severable.

Section 5.9. Limitation on Use of Funds. The Economic Development Assistance may be used solely for construction of privately-owned Improvements. Developer agrees and acknowledges that Developer may not fund any public portion of the Improvements from any or all proceeds of such Assistance, and that such usage may violate public bidding requirements as well as constitute a breach of this Agreement.

ARTICLE 6. REMEDIES

Section 6.1. In General. Except as otherwise specifically provided in this Agreement, in the event of any default in or breach of this Agreement, or any of its terms or conditions, by either party hereto, such party shall, upon written notice from the other, proceed immediately to cure or remedy such default or breach, and, in any event, shall complete such cure or remedy within sixty (60) days (or such other time as may be specifically provided herein) after receipt of such notice. In case such action is not promptly taken or not diligently pursued, or the default or breach shall not be cured or remedied within such time, in addition to such other rights as it may have hereunder, the aggrieved party may institute such proceedings as may be necessary or desirable in its opinion to cure and remedy such default or breach, including, but not limited to, proceedings to compel specific performance by the party in default or breach of its obligations and for damages for breach of contract. In any claim, action or civil proceeding wherein damages are sought for breach of this Agreement, City shall have the same rights and liabilities as a private non-governmental party for any breach of this Agreement.

Section 6.2 Minor Delay in the Completion of the Improvements. Developer acknowledges and agrees that if the Improvements are not timely constructed it will cause the City to incur damages resulting from the delay in the generation of incremental property tax revenues and in the generation of the economic development and employment opportunities that are expected to be retained and created. If construction of the Improvements is not substantially completed so as to qualify for issuance of the Certificate of Completion by December 31, 2017, as required by Section 2.2, and such nonconformity with the requirements of this Agreement is remedied by June 30, 2018, then such delay in completing the Improvements shall not be considered a default under this Agreement.

Section 6.3. Other Rights and Remedies, No Waiver by Delay. City and Developer shall have the right to institute such actions or proceedings as each may deem desirable for

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

Section 6.4. Enforced Delay in Performance. Except for an obligation to pay money to the other pursuant to this Agreement, neither City nor Developer shall be considered in breach of, or in default of, its obligations with respect to this Agreement, or any portion thereof, including redevelopment, or the beginning and completion of construction of the Improvements, in the event of an enforced delay in the performance of such obligations due to unforeseeable causes beyond its control and without its fault or negligence, including, but not restricted to, archeological artifacts, environmental contamination or remediation, temporary injunctions, acts of God, acts of the public enemy, acts of government (provided City may not rely upon its own acts as reason for delay), acts of the other party, fires, floods, epidemics, quarantine restrictions, strikes or other labor disruptions, freight embargoes, unavailability of materials, and unusually severe weather or delays of subcontractors due to such causes; it being the purpose and intent of this provision that in the event of the occurrence of any such enforced delay, the time or times for performance of the obligations of City or of Developer, as the case may be, shall be extended for the period of the enforced delay: Provided, that the party seeking the benefit of the provisions of this Article shall, within twenty (20) days after the beginning of any such enforced delay, have notified the other party thereof in writing, and of the cause or causes thereof, and setting forth the anticipated extension required as a result of the enforced delay.

Section 6.5. Rights and Remedies Cumulative. The rights and remedies of the parties to this Agreement, whether provided by law or by this Agreement, shall be cumulative, and the exercise by either party of any one or more of such remedies shall not preclude the exercise by it, at the same or different times, of any other such remedies for the same default or breach or of any of its remedies for any default or breach by the other party. No waiver made by either party shall be deemed a waiver in any respect in regard to any other rights of the party making the waiver or of any other obligations of the other party.

ARTICLE 7. MISCELLANEOUS.

Section 7.1. Representatives Not Individually Liable.

A. No member, official, or employee of City nor any officer or employee of Developer shall be personally liable in the event of any default or breach by either party or for any amount which may become due on any obligations under the terms of this Agreement.

B. Notwithstanding anything contained in this Agreement to the contrary, the person or persons executing this Agreement on behalf of either party shall incur no personal liability with respect to either party's performance hereunder.

Section 7.2. City Not a Guarantor, Surety or Partner. City is not a guarantor or surety for the redevelopment nor for any indebtedness incurred by Developer. It is mutually understood that nothing in this Agreement is intended or shall be construed as in any way creating or establishing the relationship of copartners between the parties hereto, or as constituting Developer as a contractor, agent or representative of City for any purpose of in any manner whatsoever.

Section 7.3. Interpretation of Contract.

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

B. *Titles of Articles and Sections.* Titles of the several sections, subsections, and paragraphs of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of the provisions of this Agreement.

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

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

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

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

G. *Merger.* None of the provisions of this Agreement are intended to or shall be merged by reason of any deed transferring title to either part, and any such deed shall not be deemed to affect or impair the provisions and covenants of this Agreement.

Section 7.4. Waiver of Jury Trial. City and Developer each hereby irrevocably waives all right to trial by jury in any action, proceeding or counterclaim arising out of or relating to this Agreement or any instrument or document delivered hereunder.

Section 7.5. Agreement Binding on Successors in Interest. This Agreement shall inure to the benefit of and shall be binding upon successors and assigns of the parties.

Section 7.6. Notices. A notice, demand, or other communication under this Agreement by either party to the other shall be sufficiently given or delivered if it is dispatched by registered or certified mail, postage prepaid, return receipt requested; delivered personally; or sent by overnight courier service, as follows:

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

Confluence on Third LLC
c/o Roers Investments LLC
1964 W. Wayzata Blvd., Suite 200
Long Lake, MN 55356
Attn: Brian Roers

With a copy to:

Faegre Baker Daniels LLP
801 Grand Avenue, 33rd Floor
Des Moines, Iowa 50309
Attn: Larry James

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

City of Des Moines
400 Robert D. Ray Drive
Des Moines, Iowa, 50309
Attn: City Manager

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

Section 7.7. Termination Certificate. Upon the termination of this Agreement as provided herein or upon satisfaction by the parties of all their obligations under this Agreement (including payment of the Economic Development Grant), and upon request by Developer, City shall issue to Developer a Termination Certificate certifying that Developer has satisfied all its obligations under this Agreement. Such Termination Certificate shall be in recordable form to permit it to be recorded in the records of the Polk County Recorder. Developer may utilize the Termination Certificate as evidence of its compliance with and satisfaction of all its obligations under this Agreement.

[SIGNATURES ON FOLLOWING PAGES]

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed on or as of the day first above written.

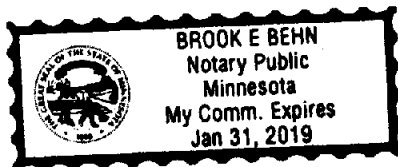
"Developer"

CONFLUENCE ON THIRD LLC

By: [Signature], Brian Roers
Its: Manager

STATE OF MN)
COUNTY OF Hennepin)
SS.

On this 9th day of October, 2015, before me, a Notary Public in and for the State of MN, personally appeared Brian Roers to me personally known, who being by me duly sworn, did state that he is the Manager of **Confluence on Third LLC**, a Delaware limited liability company, executing the within and foregoing instrument; that the instrument was signed on behalf of **Confluence on Third LLC**, a Delaware limited liability company, by authority of its members and managers; and that he as such officer acknowledged the execution of the instrument to be the voluntary act and deed of **Confluence on Third LLC** by it and by him voluntarily executed.



[Signature]
Notary Public in the State of Iowa

"City"

CITY OF DES MOINES, IOWA

ATTEST:

By: *Diane Rauh*
Diane Rauh, City Clerk

By: *T.M. Franklin Cownie*
T.M. Franklin Cownie, Mayor

APPROVED AS TO FORM:

Glenna K. Frank
Glenna K. Frank
Assistant City Attorney

STATE OF IOWA)
) ss:
COUNTY OF POLK)

On this 12th day of October, 2015, before me, the undersigned, a Notary Public in the State of Iowa, personally appeared T.M. FRANKLIN COWNIE and DIANE RAUH, to me personally known, and who, being by me duly sworn did state that they are the Mayor and City Clerk, respectively, of City of Des Moines, Iowa, a municipal corporation; that the seal affixed to the foregoing instrument is the corporate seal of the corporation; that the instrument was signed on behalf of City of Des Moines, Iowa, by authority of its City Council, as contained in the Resolution adopted by City Council under Roll Call No. 15- 1733 of City Council on the 12th day of October, 2015, and that T.M. FRANKLIN COWNIE and DIANE RAUH acknowledged the execution of the instrument to be the voluntary act and deed of City of Des Moines, Iowa, by it and by them voluntarily executed.

Laura L. Baumgartner
Notary Public in the State of Iowa

