

CONTRACT FOR CONSTRUCTION OF PUBLIC IMPROVEMENTS

BY PRIVATE DEVELOPER FOR

TAX INCREMENT DISTRICT NUMBER EIGHTY-FOUR

Between

YASMEEN DREAM, LLC

and

CITY OF RAPID CITY

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This Agreement is made and entered into on this ____ day of _____, 2021, by and between **YASMEEN DREAM, LLC**, a South Dakota limited liability company, of 520 Kansas City Street, Rapid City, SD 57701 (hereinafter the “Developer”), and the **CITY OF RAPID CITY**, a municipal corporation of 300 Sixth Street, Rapid City, SD 57701 (hereinafter the “City”).

RECITALS

WHEREAS, the City has a strong interest in promoting economic development and is authorized pursuant to South Dakota Codified Law (SDCL) Chapter 11-9 to create tax increment financing districts when the creation will stimulate and develop the general economic welfare and prosperity of the state; and

WHEREAS, the Developer made application to the City for creation of a tax increment financing district, as described herein, in order to finance improvements that would make development of certain real property within the district’s boundaries possible; and

WHEREAS, the Common Council of the City of Rapid City approved Resolution 2020-089 on January 4, 2021, creating Tax Increment District Number Eighty-four; and

WHEREAS, on January 19, 2021, the City also adopted Resolution 2020-090, which approved a Project Plan for Tax Increment District Number Eighty-four, identifying the project costs payable from the tax increment generated, pursuant to SDCL 11-9-14 and SDCL 11-9-15; and

WHEREAS, pursuant to SDCL 11-9-2(5), the City is empowered to enter into contracts or agreements necessary and convenient to implement the provisions and effectuate the purposes of the Project Plan; and

WHEREAS, the purpose of this Agreement is to establish the conditions under which the Developer may be reimbursed from the proceeds of the tax increment district for the project costs identified in the approved Project Plan; and

WHEREAS, this Agreement further establishes the procedures by which the Developer may assign its right to any proceeds from the district in order to secure private financing for the project costs contained in the Project Plan.

NOW THEREFORE, the parties hereby agree as follows:

ARTICLE I. TAX INCREMENT DISTRICT EIGHTY-FOUR

Section 1.1 *Creation.* Tax Increment District Eighty-four was created by Resolution 2020-089 of the Common Council of the City of Rapid City. The parties agree that Resolution 2020-089 was effective on February 5, 2021 (the creation of the District). Throughout this Agreement, any references to the “Tax Increment District,” the “District,” “TID” or “TIF” shall refer to Tax Increment District Eighty-four as created by Resolution 2020-089.

Section 1.2 *Base value.* The South Dakota Department of Revenue will provide the base valuation of the property within the TID.

Section 1.3 *TID Fund.* Pursuant to SDCL 11-9-31, the City shall create a TID Eighty-four Fund (the “Fund”). All positive tax increment payments for TID Eighty-four received within twenty (20) years of creation of the District, unless earlier dissolved, shall be deposited into the Fund.

Section 1.4 *Dissolution.* The parties agree that the City may dissolve the TID upon any one of the following circumstances:

- 1.4.1 The Developer has not requested city acceptance of the public infrastructure improvements contained in the Project Plan on or before February 5, 2026;
- 1.4.2 All payments required to be made to the Developer under Article VIII for all Project Plan improvements have been made; or
- 1.4.3 Twenty years following creation of the District per SDCL 11-9-25.

ARTICLE II. THE PROJECT

Section 2.1 *Project Plan.* The Common Council of the City of Rapid City approved a Project Plan for the TID on January 19, 2021. This Project Plan, including any amendments thereto approved by resolution of the City’s Common Council, is expressly incorporated into this Agreement by this reference as if fully set forth herein as an agreement of the parties.

Section 2.2 *Imputed administrative costs.* The imputed administrative costs are interest-free and are not included in the total project costs. The administrative costs will be paid from the balance remaining in the TID Fund available to the City Finance Officer beginning on February 5, 2026. The Finance Officer may withdraw monies from the fund until such time as these costs are paid in full.

Section 2.3 *Reimbursement for improvements within boundaries of TID.* The Developer shall only be reimbursed pursuant to this Agreement for construction of improvements within the boundaries of the TID. The parties agree that any improvements made outside of the boundaries of the TID are not reimbursable from the TID Fund, and the Developer further agrees that it will not seek reimbursement from the City for any improvements made outside of the District.

Section 2.4 *Reimbursement only for actual costs.* The Developer shall only be reimbursed for the actual design and/or construction costs of the improvements listed in the Project Plan. No reimbursements shall be made for design or construction costs for public improvements not listed in the Project Plan. To the extent that Developer’s design plans or Developer’s costs submitted for certification include costs for designing and building public improvements that are not included in the Project Plan or this Agreement, it is the Developer’s responsibility to separate out the non-reimbursable charges and provide the City with the documentation necessary to show that any payments from the Fund are only for approved project costs.

Section 2.5 *Revisions to Project Plan.* Developer may request a revision of the Project Plan to reallocate the project costs so long as the revision does not include additional project components or increase the total project costs beyond \$26,003,622.73. Any revision to the Project Plan shall not reallocate financing costs to any other costs. The parties agree that the City is not obligated to revise the Project Plan if Developer seeks a revision, and Developer understands that City does not guarantee that it will approve any revision if requested. Developer agrees not to seek an amendment to the Project Plan that would reestablish the base value of the property as determined in Section 1.2, pursuant to SDCL 11-9-23.

Section 2.6 *Allocation of contingency funds.* The parties agree that any allocation or reallocation of Contingency Fees to Capital Costs or Professional Fees shall not be considered an amendment to the Project Plan. Any such allocation or reallocation shall be reviewed and approved, or denied, administratively by the City's Community Development Director, whose approval will not be unreasonably withheld. If the Community Development Director rejects the proposed reallocation, the Developer may appeal such decision to the City Council.

ARTICLE III. FINANCING OF IMPROVEMENTS

Section 3.1 *Private financing.* The Developer may secure private financing to fund the improvements contemplated in the approved Project Plan. The City will only reimburse the Developer for the amount of interest actually paid to a financial institution providing financing for the public improvements contained in the Project Plan. If the Developer obtains private financing, the interest rate shall not exceed seven percent (7%) per annum during the life of the loan. At no time shall the amount of interest reimbursed exceed the maximum amount of financing interest identified in the Project Plan. If the Developer does not secure private financing from a financial institution, then the Developer shall not be reimbursed for any Financing Costs.

Section 3.2 *Financing information.* The parties agree that the City's Finance Officer may seek relevant information from Developer's financial institution about the loan terms and conditions and may contact and/or meet with the Developer's financing institution as the Finance Officer deem necessary. The Developer will provide to the City Finance Officer a Tax Increment Financing proposal from a prospective lender of its choosing which addresses these loan terms and conditions:

- 3.2.1 Fixed or variable interest rate; if variable state frequency of pricing adjustments
- 3.2.2 Interest rate index;
- 3.2.3 Interest rate spread over/under index, if any;
- 3.2.4 Loan term;
- 3.2.5 Collateral;
- 3.2.6 Guaranty requirements from the Developer; and
- 3.2.7 All identity of interests between Developer and financial institution.

Section 3.3 *Review of financing information.* The City's Finance Officer will review and analyze the proposed financing terms in order to determine that the terms are reasonable and competitive with financing available in this area. If the Finance Officer finds that the financing terms are acceptable, s/he may approve the rate to be reimbursed under this Agreement. The Finance Officer's approval will not be unreasonably withheld. If the Finance Officer rejects the proposed financing, the Developer may appeal the Finance Officer's decision to the City Council. If the interest rate is renegotiated or otherwise changes, Developer agrees to solicit competitive interest rates from three or more lenders, which will be submitted to the City Finance Officer no less than 60 days prior to the refinancing being finalized.

Section 3.4 *Refinancing.* Prior to approval of any request for refinancing, the Developer agrees to submit the information listed above for the Finance Officer's review and recommendation to the Common Council.

3.4.1 The City further reserves the right to require Developer to refinance any existing loan utilizing whatever means the City decides most beneficial to the taxpayers, including the issuance of revenue or other bonds, at any time during the term of this Agreement.

3.4.2 The City's right to require refinancing shall include the City's right to require the Developer to assign and/or reassign the loan to the City or any other entity designated by the City. If the City chooses to finance or refinance a loan, the City will be eligible for reimbursement from the TID Fund for any project or financing costs it actually incurs.

ARTICLE IV. ASSIGNMENT

Section 4.1 *Assignment to financial institution.* It is contemplated by the parties that the Developer may assign its interest under this Agreement as security for the note or loan agreement, or other financing described in Article III hereof. It is understood and agreed, by and between the parties, that any such assignment shall

4.1.1 be in writing,

4.1.2 be subject to approval by the City's Common Council, and

4.1.3 to the extent the City makes or has made disbursement pursuant to such assignment, relieve the City of the obligations to make such disbursement to Developer.

Section 4.2 *Assignee agreement.* Any assignee shall agree to be bound by the terms and conditions contained in this Agreement.

Section 4.3 *City right to refuse.* The City shall have the right to refuse any subsequent assignment if it will result in an increase in the amount of interest being paid to a financial institution, even if the interest rate being charged by the new lender otherwise complies with the terms of Article III.

ARTICLE V. CONSTRUCTION OF IMPROVEMENTS

Section 5.1 *Developer responsible for costs.* Developer agrees to construct all of the improvements described in the Project Plan at its expense. Developer is responsible for all costs to design and construct the improvements, as well as all costs to obtain necessary permits and federal, state, or other regulatory approvals for the improvements.

Section 5.2 *Time for construction.* The Developer acknowledges that the improvements must be completed and accepted by the City no later than February 5, 2026, in order to be eligible for reimbursement under this Agreement. In no event will the City reimburse the Developer for any expenditure of funds, whether for design, construction, or any other purpose if the expenditure is made by the Developer more than five years following the creation of the District.

Section 5.3 *City option.* If the Developer has not received plans approval and begun construction of Phase II of the Project Plan within 4 years of the execution of this Agreement, the City may elect to design and construct Phase II. Such election shall allow the City to be reimbursed for the costs of construction and design of Phase II from the TID Fund. Reimbursement for Phase II design and construction shall be made after the reimbursement of Phase I. Upon notice of the City electing to complete Phase II, Developer agrees to donate all rights-of-way and easements needed to construct Phase II that are located on properties that are now or later owned by it, by Hani Shafai, or by entities where Shafai is shareholder or member.

Section 5.4 *Standards for construction.* All improvements shall be designed and constructed in accordance with the requirements of the Rapid City Municipal Code, the current edition of the City's Standard Specifications for Public Works Construction (the "Standard Specs"); and the City's Infrastructure Design Criteria Manual (the "IDCM"). Professional services shall be performed by engineers, surveyors, architects or other professionals duly licensed by the State of South Dakota as may be appropriate. All applicable design plans shall be reviewed by the City for conformance to the City's ordinances, regulations and design standards. No construction of any improvement shall occur without the City's prior design plan approval.

Section 5.5 *Testing.* Developer shall employ at its sole expense a professional qualified, independent testing company to perform all testing of materials or construction that may reasonably be required by the City to ensure compliance with City standards and specifications. Developer shall furnish the City with certified copies of test results and shall release and authorize full access to the City and its designated representatives to all work-up materials, procedures, and documents used in preparing test results.

Section 5.6 *Inspection.* During construction of the improvements and until Acceptance, Developer shall request and coordinate all inspections with the City. The City will provide to the Developer or its representative a list of the required inspections. The City will have two (2) business days in which to conduct an inspection when requested. Upon completion of the required inspection, the City will provide the Developer or their representative a notification verifying that the inspection was completed. If the Developer does not request a required inspection, the City shall have the right to require the Developer to remove and replace any improvements which were installed without the required inspection. The Developer shall reasonably cooperate and assist the

City to gain access to the areas designated for inspection. The Developer shall also notify the City upon discovery that any improvements were not installed or constructed in conformance with the approved plans, or the City's standards and specifications. Inspection and acceptance of work by the City shall not relieve Developer of any responsibility under this Agreement.

ARTICLE VI. ACCEPTANCE OF PUBLIC IMPROVEMENTS

Section 6.1 *Acceptance.* The Developer agrees that the improvements constructed pursuant to the Project Plan will be dedicated to the City once they are constructed. The process for acceptance of the improvements by the City will follow the Standard Specs, the requirements of which are hereby incorporated into this Agreement.

Section 6.2 *Warranty.* Developer agrees to warrant the improvements constructed in accordance with the Standard Specs. The warranty surety provided by Developer, as required by the Standard Specs, shall not be considered as an expenditure eligible for reimbursement from the TID Fund.

Section 6.3 *Public Right-of-way.* The Developer agrees to furnish to the City at no cost all necessary easements and public rights-of-way to allow the City to accept, access, and maintain the improvements dedicated to the City. The public rights-of-way shall be dedicated to the City, or easements granted, prior to Acceptance of the improvements.

Section 6.4 *Drainage Easements.* Notwithstanding Section 6.3 above, the City agrees that payment from the TID Fund shall be made to Developer for all drainage easements furnished to the City for the purpose of regional drainage ponds. The City agrees to hire a certified appraiser to ascertain the value of the easements, the cost of which shall be reimbursable from the TID Fund. The reimbursement to Developer for the drainage ponds shall be the lesser of the amount allocated in the Project Plan or the appraised value.

ARTICLE VII. CERTIFICATION

Section 7.1 *Acceptance Required.* Prior to Developer certifying the costs of improvements, such improvements must be accepted by the City, warranty surety provided, and any required easements or right-of-way dedicated to the City.

Section 7.2 *Certification.* Upon completion and Acceptance of the improvements, the Developer shall certify to the Director of the Department of Community Development that such improvements have been completed and shall certify the amount of money disbursed therefore. Submission of the final cost certification shall be made to the Department of Community Development no later than 180 days after the City's Acceptance of the last of the public improvements within the TID boundary as provided in the Project Plan. The certification shall be a statement, sworn on oath or affirmation under penalty of perjury, made by an authorized officer or director of Developer. The certification shall be accompanied by sufficient supporting documentation as provided by Section 7.3.

Section 7.3 *Supporting Documentation.* The Developer shall provide sufficient documentation to certify that the terms of this Agreement are complied with. In addition to the certification statement, the Developer shall provide a spreadsheet tabulation of all project costs that includes a summary of all expenditures per Project Plan cost item. The City shall have the right to require reasonable documentation to establish that the amounts set forth have, in fact, been disbursed for the costs contemplated in the Project Plan, that state bid laws have been complied with, and that the provisions in this Agreement have been met. The Developer Professional services invoices submitted for certification shall sufficiently describe the professional activity. If an invoice references any report, study, location, design, layout, survey, or similar drawings, the referenced item shall be provided as an attachment to the invoice. All documentation provided in support of Certification shall be provided in both paper and digital (.pdf) format.

Section 7.4 *City approval of Certification.* Upon submittal of the Certification and supporting documentation, the City shall have 180 days to review the same for compliance with the Project Plan, state law, city ordinances, and this Agreement.

Section 7.5 *Certification by phase.* The parties agree that Developer may certify its costs by phase. Certification for each phase shall require completion and Acceptance of all improvements in such phase, as detailed in the Project Plan, prior to submission.

ARTICLE VIII. REIMBURSEMENTS BY CITY TO DEVELOPER

Section 8.1 *Payments.* Upon Certification, the City shall within a reasonable time, generally within forty-five (45) days after the receipt of each tax increment payment from the Treasurer of Pennington County, disburse the total amount in the TID Fund to the Developer or its assignee. Payments shall be subject to the following limitations:

- 8.1.1 Any limitation in applicable federal, state, or local laws and regulations;
- 8.1.2 Articles II, VII, VIII and IX, and any other terms of this Agreement; and
- 8.1.3 At no time shall the cumulative total of payments made to Developer from the Fund exceed the lesser of
 - (a) the total amount of disbursements certified pursuant to Article VII of this Agreement, or
 - (b) the total of the estimated project costs set forth in the Project Plan.

Section 8.2 *Initial Payment Exception.* The parties agree that the 45-day timeframe will not apply to the first payment after Certification, as such payment is approved by the Common Council through its approval process.

Section 8.3 *Limited Obligation.* It is specifically a condition of this Agreement and a condition of the City's obligation to pay, that all sums payable shall be limited to the positive tax increment from the TID receipted into the TID Fund. The obligation of the City to reimburse Developer pursuant to this Agreement does not constitute a general indebtedness of the City or a charge against the City's general taxing power. Developer agrees that it shall bear all risks that the positive tax increment from the TID may be insufficient to fully reimburse the Developer for the Project Costs. The provisions of SDCL 11-9-36 are specifically incorporated herein by reference.

Section 8.4 *No Guarantee.* It is also specifically agreed that the City has made no representation that the proceeds from such fund shall be sufficient to retire any indebtedness incurred by Developer under Articles III and IV hereof. The parties further acknowledge that SDCL 11-9-25 limits the duration of allocation of the positive tax increment payments to the Fund to 20 years. The provisions of SDCL 11-9-25 are specifically incorporated herein by this reference.

Section 8.5 *Overlapping TIDs.* It is understood by the parties that the boundaries of the TID may overlap the boundaries of other tax increment districts. Any increments generated from areas within overlapping districts will be used to pay for the improvements in the districts based on the chronological order in which the districts were created. Only after the disbursements required of the City in the project plans or developer's agreements for any previously-created districts have been satisfied will the City have a duty to disburse funds under this Agreement which were generated in areas that are part of previously-created overlapping districts.

Section 8.6 *Overpayment.* Developer shall, upon demand by the City, promptly reimburse the TID Fund for any payment by the City to Developer that

8.6.1 exceeds the amounts actually expended for Project Plan improvements;

8.6.2 is attributable to improvements constructed outside of the District;

8.6.3 is attributable to project costs not included in the Project Plan; or

8.6.4 conflicts with the terms of this Agreement.

ARTICLE IX. COMPLIANCE WITH COMPETITIVE BIDDING LAWS

Section 9.1 *Applicable Laws.* As the costs for the Improvements will be reimbursed with public funds, the parties agree that the Developer's Project is subject to the provisions of South Dakota law regarding the expenditure of public funds contained in Chapters 5-18A through 5-18D, and Chapter 5-21 of South Dakota Codified Laws. Selection of contractors and administration of the Project shall comply in all respects with such laws, and the Developer shall provide the City with documentation demonstrating such compliance.

Section 9.2 *Bid Schedules.* Developer shall complete the improvements described in the Project Plan consistent with the costs in the Project Plan. The engineer's estimated bid item proposal for all developer-initiated construction projects within the TID boundary shall identify each capital cost line item as a separate bid schedule. The engineer's estimated bid items shall also include all construction expenditures not eligible for reimbursement from TID Funds as identified on the Public Improvements Map included in the Project Plan.

ARTICLE X. BOOSTER STATION

Section 10.1 *Feasibility Study.* The Developer agrees to fund a feasibility study for the Booster Station improvement included in the Project Plan. The Developer shall provide funding to the City, which shall engage a consultant to perform the feasibility study. The costs of the feasibility study shall be considered eligible for reimbursement from the TID Fund. The City expects to

engage its consultant contemporaneously with execution of this Agreement. The agreement between City and its consultant provides a timeline for study completion, which is dependent upon Developer providing information to the consultant. The final technical memorandum and review is expected 15 weeks after notice to proceed, which is expected to be issued March 16, 2021.

Section 10.2 *Booster Station Construction.* The parties acknowledge that the feasibility study has yet to be completed at the time this Agreement is entered. The parties agree that construction of the Booster Station shall be in accordance with the City's Standard Specs, IDCM, and relevant ordinances, which includes the exception processes for the IDCM.

ARTICLE XI. INDEMNIFICATION AND INSURANCE

Section 11.1 *Indemnification.* Developer agrees to indemnify, defend, and hold harmless the City from and against any and all liability, losses, claims, damages, suits, costs, and expenses including, but not limited to, costs of defense and reasonable attorney's fees, which the City may hereafter suffer itself or pay to another party, by reason of any claim, action, or right of action, at law or in equity, arising out of this execution of the terms of this Agreement by the Developer, its employees, consultants, contractors, subcontractors, or any other person or entity engaged by the Developer.

Section 11.2 *Insurance coverage.* The Developer shall maintain policies of insurance, naming the City as an additional insured, until Acceptance of all improvements by the City. The policies shall have the following minimum coverage amounts:

- 11.2.1 Workers' Compensation Insurance as required by South Dakota state statute and all other insurance required by any applicable law;
- 11.2.2 Commercial General or Business Liability Insurance with minimum combined single limits of One Million Dollars (\$1,000,000.00) for each occurrence and Two Million Dollars (\$2,000,000.00) general aggregate; and
- 11.2.3 Automobile Liability Insurance with minimum combined single limits for bodily injury and property damage of not less than One Million Dollars (\$1,000,000.00) for any one occurrence, with respect to each of Developer's owned, hired or non-owned vehicles assigned to or used in connection with this Agreement.

Section 11.3 *No limit of liability.* The coverages and limits specified above are to be considered as minimum requirements and in no way limit the liability of the Developer or the Developer's obligations under Section 11.1.

Section 11.4 *Proof of coverages.* The policies of insurance shall be in such form and issued by such insurer as shall be satisfactory to the City. The Developer shall furnish the City a certificate evidencing compliance with the foregoing requirements that shall provide not less than 30 days prior written notice to the City of any cancellation or material change in the insurance.

Section 11.5 *Contractor coverage.* The Developer shall include the provisions of Section 11.2 in its agreements with contractors engaged to construct the Improvements, substituting the

contractor for “Developer” as appropriate. Additionally, the Developer shall ensure that all engineers and architects engaged to design the improvements shall maintain professional liability insurance coverage in an amount at least as large as the amount of the architectural or engineering services contract, but in no event less than \$500,000. Such engineers and architects shall also name the City as additional insured.

ARTICLE XII. ADDITIONAL DEVELOPER WARRANTIES

Section 12.1 *Developer’s Representations.* Developer represents to the City as follows:

- 12.1.1 Developer is a limited liability company organized under the laws of the State of South Dakota and is, and will remain, in good standing;
- 12.1.2 Developer has the authority to enter into this Agreement and to perform the requirements of this Agreement without further action;
- 12.1.3 Developer’s performance under this Agreement will not violate any applicable judgment, order, law, or regulation, or previous obligation of Developer;
- 12.1.4 Developer’s performance under this Agreement will not result in the creation of any claim against the City for money or performance, any lien, charge, encumbrance or security interest upon any asset of the City; and
- 12.1.5 Developer has sufficient capital and financing to perform all of its obligations under this Agreement and the Project Plan.

Section 12.2 *Tax Abatement Waiver.* Developer agrees that it will not seek any tax abatement for its property within the boundaries of Tax Increment District Eighty-four while the district is in existence.

Section 12.3 *Liens.* Developer agrees to promptly satisfy or bond over any and all mechanic’s liens or materialmen’s liens that arise as a result of the construction of the projects described in the Project Plan. This provision shall not prevent Developer from subsequently seeking compensation from subcontractors or others who may be responsible for such liens or for such payment. Mechanic’s lien waivers and materialmen’s lien waivers shall be submitted as part of the certification as provided in Article VII.

Section 12.4 *Examination of records.* Developer agrees to keep and maintain books and records, in accordance with generally accepted accounting principles, devoted exclusively to its activities related to the design, financing, construction, and implementation of the Project Plan. Such records shall include, but not be limited to, books, ledgers, journals, accounts, bank statements, contracts, invoices, pay requests, notices, plans, applications, and federal, state, and/or local compliance reports filed on behalf of the Developer relating to the Project. The City or its authorized agent shall have the right to examine, inspect, and copy such records from time to time, upon reasonable notice to Developer and during Developer’s ordinary business hours. Upon completion of the Project, or upon request, a copy of all such records shall be provided to the City. This requirement shall terminate five years following the dissolution of the District.

ARTICLE XIII. DEFAULT AND REMEDIES

Section 13.1 *Developer Default.* The occurrence of any one of the following events shall constitute a default of the Developer:

- 13.1.1 The abandonment of the Project for a period of twelve consecutive months;
- 13.1.2 Failure to construct the improvements in Phase I, or any of them, as set out in the Project Plan without the express approval of the City's Common Council;
- 13.1.3 Failure to construct the improvements in Phase I, or any of them, within the time provided in Section 5.2;
- 13.1.4 Developer dissolves or is administratively dissolved;
- 13.1.5 Developer enters any type of proceedings related to its insolvency, whether bankruptcy, receivership, or otherwise; or
- 13.1.6 Failure in the performance of any of Developer's obligations in this Agreement, which failure is not cured within thirty (30) days after notice is given;

Section 13.2 *City Remedies for Developer Default.* In the case of a default under Section 13.1, the City shall have the right to exercise any one or more of the following options:

- 13.2.1 To terminate this Agreement;
- 13.2.2 To construct any incomplete or unconstructed Phase I improvements;
 - (a) Upon exercising such option, the City shall have the right to suspend all payments from the TID Fund to assure adequate funds are available or will be available to reimburse the City for such construction.
 - (i) The City shall have the right to prioritize all remaining funds, and funds received following exercise of such option, for the reimbursement of the City's costs of designing and constructing incomplete or unconstructed Improvements.
 - (ii) Funds remaining after reimbursement of the City's costs of designing and constructing incomplete or unconstructed Improvements shall be used to reimburse Developer for Improvements constructed and accepted by the City.
 - (b) The City shall have the right to obtain and use all bid documents, construction designs, and related plans for such Improvements.
 - (c) The City shall further have the right to require Developer to assign any construction contracts for Improvements in progress.
- 13.2.3 To suspend reimbursement payments under Article VIII until Developer cures the default; and

13.2.4 To refuse reimbursement payments under Article VIII for improvements that are not constructed, incomplete, or completed in violation of the terms of this Agreement or applicable state law.

Section 13.3 *Cumulative Remedies.* The rights and remedies under this Agreement are in addition to and not exclusive of any other rights, remedies, powers and privileges, whether at law or in equity, under this Agreement or otherwise, that any party may have against another. No failure to exercise and no delay in exercising any right, power, or privilege shall operate as a waiver thereof, nor shall any single or partial exercise of any right, power, or privilege preclude the exercise of any other right, power, or privilege.

ARTICLE XIV. MISCELLANEOUS

Section 14.1 *Entire Agreement.* This Agreement and the documents referred to herein (including but not limited to the TID Eighty-four Project Plan, including any amendments thereto and any exhibits and schedules incorporated therein) contain the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersede all prior agreements, negotiations, and understandings, whether written or oral, relating to the subject matter hereof. No other promises or consideration form a part of this Agreement. All prior discussions and negotiations are merged into these documents or are intentionally omitted. This Agreement may only be amended by a written document duly executed by all parties.

Section 14.2 *Third Parties.* This Agreement is intended solely for the benefit of the parties hereto and shall not be enforceable by, or create any claim of right or right of action, in favor of any other party. Except as expressly allowed by this Agreement, the rights and obligations of the parties hereunder shall not be assigned or transferred by either party without the express written consent of the other. Subject to that restriction, this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns, and legal representatives.

Section 14.3 *Waivers.* Failure of a party to insist upon strict adherence to any term of this Agreement on any occasion shall not be considered a waiver, or deprive that party of the right thereafter to insist upon strict adherence to that term, or any other term of this Agreement.

Section 14.4 *Severability.* The invalidity of all or any part of any section of this Agreement shall not render invalid the remainder of this Agreement or the remainder of such section if it can be given effect without the invalid provisions. If any provision of this Agreement is held to be invalid or unenforceable for any reason, it shall be modified rather than voided, if possible, in order to achieve the intent of the parties to this Agreement to the extent possible.

Section 14.5 *Further Action.* The parties covenant and agree that each shall execute and deliver such further instruments or documents as shall be necessary or convenient to effectuate the purposes contemplated by this Agreement.

Section 14.6 *Counterparts.* This Agreement may be executed in counterparts; each such counterpart shall be deemed an original and when taken together with other signed counterparts, shall constitute one Agreement.

Section 14.7 *Construction.* When construing the meaning of the provisions in this Agreement, the following shall govern:

- 14.7.1 The language in all parts of this Agreement shall in all cases be construed as a whole according to its fair meaning and not strictly for nor against any party.
- 14.7.2 The headings and numbering of the different paragraphs of this Agreement are inserted for convenience only and are not to control or affect the meaning, construction, or effect of each provision.
- 14.7.3 Words used in this Agreement in the singular, where the context so permits, shall be deemed to include the plural, and vice versa. Words used in the masculine or the feminine, where the context so permits, shall be deemed to mean the other.
- 14.7.4 Any reference in this Agreement to an article or section number shall mean such article or section in this Agreement unless otherwise expressly stated.
- 14.7.5 The parties agree that each party has reviewed this Agreement and has had the opportunity to have its counsel review the same. In the event an ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by the parties and no presumption or burden of proof shall arise favoring or disfavoring any party by virtue of the authorship of any of the provisions of this Agreement.

Section 14.8 *Choice of Law.* This Agreement shall be governed and construed in accordance with the laws of the state of South Dakota, without regard for its choice-of-law principles, and all claims relating to or arising out of this Agreement, or the breach of the terms thereof, whether sounding in contract, tort or otherwise, shall likewise be governed by the laws of the state of South Dakota, without regard for its choice-of-law principles

Section 14.9 *Jurisdiction and Venue.* The parties hereto explicitly agree to submit to the personal jurisdiction of South Dakota state courts, and any dispute relating to or arising out of this Agreement, or the breach of the terms thereof, whether sounding in contract, tort or otherwise, shall be decided solely and exclusively by the Circuit Court of Pennington County, South Dakota.

[Signature pages follow]

Dated this _____ day of _____, 2021.

CITY OF RAPID CITY

By _____
Steve Allender, Mayor

Attest

Pauline Sumption, Finance Director

(seal)

