DEVELOPMENT AGREEMENT BETWEEN THE CITY OF RAPID CITY AND CR LLOYD ASSOCIATES FOR THE DEVELOPMENT OF A MIXED USE PROJECT AND FOR THE PAYMENT OF FUNDS FROM THE REVENUE GENERATED BY TAX INCREMENT FINANCING DISTRICT EIGHTY-FIVE.

THIS DEVELOPMENT AGREEMENT is entered into as of this _____ day of ________________, 2022 (this “Agreement”) by and between the CITY OF RAPID CITY, a South Dakota municipal corporation (“City”), and CR LLOYD ASSOCIATES, INC., a South Dakota corporation, 101 S. Reid Street, Suite 201, Sioux Falls, SD 57104 (“Developer”);

WITNESSETH:

WHEREAS, City (itself or through an agency of the City) is the fee owner of the following described real property:

500 St. Joseph Street, Rapid City, South Dakota

Tract A and the vacated east thirteen (13) feet of Sixth Street and the vacated south three and one-half (3½) feet of Saint Joseph Street, and the vacated west one (1) foot of Fifth Street adjacent to said Tract A, Block 95, the Original Town of Rapid City, located in the North Half (N½) of the Northwest Quarter (NW¼) of Section One (1), Township One (1) North, Range Seven (7) East, Black Hills Meridian, Rapid City, Pennington County, South Dakota, according to the recorded plat thereof (the “Property”); and

WHEREAS, Developer has presented to the City a proposal for the development of the Property as a mixed-use commercial and residential development that will include ground-level retail and commercial spaces, not fewer than 65 loft-style apartment homes, and an upscale hotel with meeting spaces, each as further identified in this Agreement (the “Project”); and

WHEREAS, Developer has presented reasonable rationale to the City that the development of the Property will be beneficial for the growth and vitality of downtown Rapid City; and

WHEREAS, Developer has presented to the City reasonable evidence that it has now, and will have throughout the development of the Project, the financial capability to perform all of Developer’s obligations under this Agreement; and

WHEREAS, the City, after careful consideration, has determined that the Project as contemplated by Developer will further the growth of the City, improve the environment of the City, provide additional and enhanced services to the City, foster increased vitality and economic activity within the City and its downtown core, increase employment opportunities within the City, and otherwise be in the best interest of the City and its residents and taxpayers by furthering the health, safety, and welfare of its residents and taxpayers, and the City is therefore willing to enter into this Agreement with Developer and, among other things, to provide the financial incentives to Developer as provided herein; and

WHEREAS, the City and Developer acknowledge that the development of the Project as contemplated by the City and Developer requires economic assistance from the City in order to complete such development in accordance with the schedule required of Developer and that, but for the economic
assistance to be granted hereunder, the development of the Project as contemplated by the City and Developer would not be economically viable at this time; and

WHEREAS, City has an interest in eliminating the blight and in promoting economic development and is authorized pursuant to SDCL Chapter 11-9 (the “Act”) to create tax increment districts for such purposes; and

WHEREAS, the City has adopted a Resolution, a copy of which is attached hereto as Exhibit A, which authorizes the creation of Tax Increment Financing District #85 for the purpose of generating tax increment revenue from the Property which has been deemed necessary for the successful completion of the Project; and

WHEREAS, in order to accelerate the development of the Project on the Property, the Rapid City Council has, concurrently with the execution of this Agreement, adopted a Resolution, a copy of which is attached hereto as Exhibit B, by which the City has approved a Tax Increment Project Plan (the “Project Plan”) encompassing the Property, which identifies the expenditures for public improvements that qualify as project costs pursuant to SDCL 11-9-14 and SDCL 11-9-15, and which includes the payment of a grant in an amount not to exceed $8,750,000, plus costs of financing, toward certain Project Costs, as described in the Project Plan;

WHEREAS, the Property is being sold to the Developer by the City (or City’s designee) pursuant to that certain Commercial Real Estate Purchase Agreement entered concurrently herewith (the “Purchase Agreement”) solely for implementation of the Project pursuant to the Project Plan as contemplated hereunder by the City, and the Project description, the implementation of the Project by Developer and the Project deadline time periods provided for herein are each material inducements to the City to enter into this Development Agreement; and

WHEREAS, City and Developer wish to enter into this Agreement in order to set forth the terms and conditions of the vesting of certain development rights and to effectuate and memorialize the Parties’ negotiations of various improvement matters.

NOW, THEREFORE, in consideration of the mutual promises, covenants, obligations, apportionments and benefits contained in this Agreement, City and Developer hereby agree as follows:

Section 1. Definitions

Unless the context otherwise requires, the terms used in this Agreement will have the meanings set forth in this Section. If not defined in this Agreement, capitalized terms will have the meaning given to them in the Project Plan.

“Act” means SDCL Chapter 11-9, as may be amended from time to time.

“Base Revenues” means the taxes collected on the Base Value.

“Base Value” means the value of the Property at the time of the creation of the TID as certified by the South Dakota Secretary of Revenue.

“Approved Reimbursable Expenses” shall have the meaning set forth in Section 2.09.
“Financier” shall mean any mortgagee, beneficiary, or trustee of Developer debt placed as an encumbrance on the Property in accordance with Section 7.12.

“Interest Costs” means interest which will accrue on the Reimbursable Project Costs in accordance with Section 2.05(b) and will be reimbursed to Developer by the City through the use of Tax Increment Revenues.

“Non-Project Costs” Any costs associated with the completion of this Project which have not specifically been identified as reimbursable by Tax Increment Revenues in this Agreement, or the Project Plan.

“Public Improvement” means the process of building, altering, repairing, improving, or demolishing any public infrastructure facility, including any structure, building, or other improvements of any kind to real property, the cost of which is payable from taxes or other funds under the control of the purchasing agency, and includes any local improvement for which a special assessment is to be levied. For purposes of this Agreement, Public Improvements are described in Sections 2.09 and 3.01.

“Principal” the current amount, at any point in time, of Tax Increment Revenues owed the Developer equaling the initial Principal (Reimbursable Project Costs), less any payments received by Developer and applied to Principal.

“Project” will have the meaning specified in the Recitals and Section 3.01 of this Agreement.

“Project Costs” means the costs allowed under the Act and set forth in the Project Plan and Section 2 of this Agreement, and any additional costs necessary to complete the Project Costs but excepting therefrom any Non-Project Costs.

“Project Plan” means the Project Plan attached as Exhibit A.

“Project Schedule” means the implementation and construction schedule delivered to the City’s Department of Community Development by Developer as part of its Application for Tax Increment Financing, time being of the essence.

“Property” will have the meaning set forth in the recitals.

“Purchase Agreement” means that certain Commercial Real Estate Purchase Agreement for the Property entered into by and between the City, as “Seller,” and Developer, as “Buyer”, wherein the City agreed to sell the Property, whether directly or through a third-party intermediary, to Developer for $1.00 and other good and valuable consideration, subject to Developer’s compliance with this Agreement.

“Reimbursable Project Costs” means those costs set forth in Section 2.09, determined at a point in time when actually incurred in an amount not to exceed $8,750,000.00, exclusive of Interest Costs, which will be reimbursed to Developer by the City, through the use of Tax Increment Revenues.

“Reserved Powers” means (i) the discretion of the City or any of its officers or officials with regard to rules, regulations, ordinances, laws and policies that require the exercise of discretion by the City or any of its officers or officials, (ii) the application of City ordinances, regulations or
policies, including the terms of any that are specifically mandated and required by changes in state or federal laws or regulations, (iii) any City ordinance, resolution, regulation, or official policy, which is reasonably necessary to protect persons on the Property and in the immediate community, or both, from conditions dangerous to their health, safety, or both, shall apply to the Project notwithstanding that the application of such ordinance, resolution, regulation, or official policy or other similar limitation would result in the impairment of Developer’s vested rights under this Agreement; (iv) written regulations, policies and rules governing objective engineering and construction standards and specifications applicable to public and private improvements, including, without limitation, all applicable building codes and similar codes adopted by the City and any local amendments to those codes adopted by the City; (v) laws of the City that impose, levy, alter or amend fees, charges, or land use regulations relating solely to post-development conduct of consumers or end users, such as, without limitation, trash can placement, service charges and limitations on vehicle parking, so long as those later enactments do not impair Developer’s vested rights to develop the Project.

“Sources and Uses of Funds Statement” means the statement setting forth the Project’s sources and uses of funds delivered to the City’s Department of Community Development by Developer as part of its Application for Tax Increment Financing, which statement shall have been approved by the City’s Department of Community Development prior to commencement of the Project.

“Tax Increment Revenues” means all tax revenues of the Property in excess of the Base Revenues.

“TID” Tax Increment Financing District #85.

“TID Fund” a/k/a the “Fund” means the designated fund established by the City for the purpose of receiving and expending Tax Increment Revenues.

Words used herein in the singular, where the context so permits, also includes the plural and vice versa, unless otherwise specified. Unless otherwise specified, the terms used in this Agreement found in the Act shall have the meaning set forth in the Act.

Section 2. Development of Project; Tax Increment Financing; Project Costs

2.01 Developer’s Representations. Developer represents to City as follows:

(a) Developer is a corporation formed in the State of South Dakota and is in good standing;
(b) Developer has full power and authority to enter into this Agreement and to perform the requirements of this Agreement in accordance with its terms without further action and without the consent of any third party;
(c) Developer’s performance under this Agreement shall comply with all applicable city, state, and federal laws and regulations;
(d) Developer’s performance under this Agreement will not violate any applicable judgment, order, law or regulation or previous obligation of Developer;
(e) Developer’s performance under this Agreement will not result in the creation of any claim against City for money or performance, any lien, charge, encumbrance or security interest upon any asset of City;

(f) Before Developer seeks reimbursement from the City for Reimbursable Project Costs, Developer will have sufficient capital and financing to perform all of its obligations under this Agreement and the Project Plan, and will, upon the City’s request, provide proof of such financial capabilities to the City’s reasonable satisfaction as provided in Section 7.11, which is a condition precedent to any such reimbursement.

2.02 Application for Tax Increment Financing. Developer may submit applications for distribution of the tax increment financing pursuant to the TID Agreement and the City’s policy governing the application and use of tax increment finance, and Developer shall pay the City’s applicable application fee therefor. City agrees to expeditiously process said submissions.

2.03 City’s Approvals. Developer and City intend that except as otherwise specifically provided herein or as otherwise agreed to by the Parties, this Agreement shall be subject to any ordinance, resolution, regulation or policy that is adopted and applied on a uniform, city-wide basis and directly concerns an imminent public health or safety issue. In such case, City shall apply such ordinance, resolution, regulation or policy uniformly, equitably and proportionately to Developer, the Property and Project and to all other public or private owners and properties directly affected thereby. Notwithstanding anything contained in the foregoing, the parties acknowledge that development in urban settings often requires atypical exceptions to certain policies in order to achieve the applicable parties’ goals; accordingly, the City and Developer agree that they will work together in good faith to mutually resolve any issues that arise in a manner consistent with redevelopment of similar sites in the City and in other similarly situated communities.

Nothing contained in this Agreement shall be construed to limit any Reserved Powers or the authority or obligation of the City to hold necessary public hearings. Nothing in this Agreement shall preclude the application of the development of the Project to changes in City ordinances, regulations or policies, the terms of which are specifically mandated and required by changes in state or federal laws or regulations. In the event state or federal laws or regulations enacted after the date of this Agreement prevent or preclude compliance with one or more provisions of this Agreement or require changes in plans, maps or permits approved by the City, this Agreement shall be modified, extended or suspended as may be necessary to comply with such state or federal laws or regulations or the regulations of such other governmental jurisdiction and the Parties hereto will work together in good faith to negotiate a mutually acceptable resolution to the situation.

To the extent that any actions of federal or state agencies (or actions of regional and local agencies, including the City, required by federal or state agencies) have the effect of preventing, delaying or modifying development of the Project, the City shall not in any manner be liable for any such prevention, delay or modification of said development. The Developer is required, at its cost and without cost to or obligation on the part of the City, to be subject to such development restrictions as may be necessary or appropriate by reason of such actions of federal or state agencies.

2.04 Developer’s Financial Approvals. Developer’s obligations pursuant to this Agreement are subject to Developer determining within thirty (30) days of submitting its building plans, for final building permit, the financing and capital to complete the Project Developer presented pursuant to Section 7.11 remains viable and sufficient to meet Developer’s obligations to complete the Project, the Project Costs
are reasonable and acceptable, the market conditions support the expected revenues to be generated from the Project, it is beneficial for Developer to complete the Project Plan and Developer will be able to complete the Project within the Project Schedule. If Developer decides to terminate the Project for any of the reasons set forth in this Section 2.03, or fails to timely construct or abandons the Project or otherwise breaks this Agreement, Developer will provide to the City a written notice of termination within ten (10) business days after the expiration of such 30-day period.

2.05 Remittance of Tax Increment Revenues.

(a) As reimbursement for Reimbursable Project Costs, City agrees to pay to Developer, but solely from Tax Increment Revenues, a sum not to exceed $8,750,000, exclusive of Interest Costs.

(b) In addition to Reimbursable Project Costs, City agrees to pay to Developer, but solely from Tax Increment Revenues, Interest Costs determined at rate equal to the lesser of (i) the interest rate charged by Developer’s lender in relation to the actual Interest Costs incurred by Developer, or (ii) 0.5% over the interest rate charged to the Developer by a reputable lending institution in the financing related to the hotel component of the Project. Notwithstanding the foregoing with respect to interest that will accrue on the portion of the Reimbursable Project Costs that are not financed by Developer’s lender and are instead contributed to the Project as equity from Developer, the parties agree that the interest rate employed to determine such Interest Costs will be a rate equal to the lesser of (i) the interest rate charged by Developer’s lender in relation to the actual Interest Costs incurred by Developer, or (ii) 4.5% per annum.

2.06 Determination of Reimbursable Project Costs and Initial Principal. The actual amount of Principal payable to Developer shall be determined as follows:

(a) Certified Reimbursable Expenses in Sections 2.08 and 2.09 shall form the basis of the total Reimbursable Project Costs but shall not exceed $8,750,000, exclusive of interest costs. Subject to any adjustments made to this basis as allowed by this Agreement, the total amount payable shall be the beginning Principal balance.

(b) Developer shall not be eligible for participation in the City’s Downtown Tax Reduction Program, subject to the Developer’s qualification and acceptance of such and any discontinuance of, and requirements of, such program by the City.

2.07 Determination of Interest Costs. Interest Costs shall be determined and paid as follows:

(a) Interest shall begin to accrue on the Principal balance upon the later to occur of (1) Developer obtaining title to the Property, (2) Developer commencing construction of the Project on the Property, or (3) the closing date for the Developer’s financing of the Reimbursable Project Costs.

(b) All Tax Increment Revenues paid by the City to Developer will be applied first to accrued Interest Costs, and then to Principal, and payments shall cease at such time as the Principal balance is paid in full.

2.08 Review and Approval of Reimbursable Project Costs. Developer shall advance all development, construction and Project Costs identified in the TID Agreement for reimbursement by future tax increment proceeds. The TID Agreement describes the eligible Reimbursable Project Costs to be reimbursed from tax increment proceeds and the aggregate maximum amount and duration for which tax increment proceeds can be reimbursed. Any amount payable to the Developer for Reimbursable Project
Costs must be approved by the City. Developer shall submit to the City in writing, on a form acceptable to the City, its actual costs incurred prior to reimbursement. The City shall timely review and approve the submitted costs as reimbursable/payable if the costs reasonably correspond to the Project Costs estimated in the Project Plan and comply with the Act.

2.09 **Approved Reimbursable Project Costs Defined; Conditional.** The City and Developer have identified expenses within the Project Plan subject to reimbursement and which are summarized here. Satisfactory completion of these activities in a timely manner (time being of the essence) is a condition of the Developer receiving any TID Financing. The parties acknowledge that these are engineer’s estimates and could vary. The parties further agree that none of these estimates are caps on that line item, the total that can be reimbursed from the TID is $8,750,000 to pay for the activities generally listed below.

<table>
<thead>
<tr>
<th>Eligible Reimbursable TIF Activity</th>
<th>Estimated Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>Site Preparation including cleaning of the contaminated Site including soil remediation and excavation</td>
<td>$1,172,050.00</td>
</tr>
<tr>
<td>Design, Engineering, Testing, Legal, and Administrative Costs of the TIF</td>
<td>$850,000.00</td>
</tr>
<tr>
<td>Utility Relocation</td>
<td>$362,515.00</td>
</tr>
<tr>
<td>Parking Structure Construction</td>
<td>$11,410,058.00</td>
</tr>
<tr>
<td>Streetscaping and Street Construction</td>
<td>$245,300.00</td>
</tr>
</tbody>
</table>

In addition, for avoidance of doubt, the associated design, engineering, testing, legal, and administrative costs of the TIF Activities is reimbursable and included as Reimbursable Project Costs. Notwithstanding anything contained in this Agreement to the contrary, the City’s obligation to reimburse Developer for any costs identified in the tax increment plan shall be terminated in the event the City approval of the tax increment plan or any tax increment process related thereto, is referred by the voters and the voters do not approve the tax increment plan.

2.10 **Overpayment.** Developer shall reimburse the Fund for any ineligible Project Costs paid by City to Developer.

2.11 **Grant.** The parties acknowledge that Developer’s right to receive the Tax Increment Revenues hereunder is a grant under the Act, and a personal property right vested with Developer on the date hereof.
2.12 **No Certificated Tax Increment Revenue Bonds.** City will have no obligations to the Developer except as set forth in this Agreement and will not issue any certificated tax increment revenue bonds to evidence such obligations.

2.13 **Timing Payment of Tax Increment Revenues.** The City will make eligible payments due to Developer within a reasonable time, generally within 45 days from the City’s receipt of Tax Increment Revenues.

2.14 **Continued Cooperation.** City and Developer represent each to the other they will make reasonable efforts to expedite the subject matters hereof and acknowledge the successful performance of this Agreement requires its continued cooperation.

2.15 **No General Obligation of the City.** City’s funding obligations are limited obligations payable solely out of the Tax Increment Revenues and are not payable from any other revenues of City, nor a charge against its general taxing power. Developer shall bear all risks that such Tax Increment Revenues may be insufficient to pay the maximum amounts specified in 2.05.

2.16 **Assignment of Payments.** Upon written notice to the City and City’s written approval and consent, Developer may assign to its lender or lenders its rights to payments hereunder for the purposes of financing Developer’s obligations related to this Agreement, but Developer’s and any assignee’s right to such payments, in all events, is subject to the other limitations of this Agreement. Further, Developer may assign this Agreement to a single purpose entity created solely for the purpose of holding and developing the Property upon notice thereof to the City, which assignment will be conditioned upon such entity agreeing to be bound by the terms and conditions of this Agreement. No other assignment of this Agreement is permitted without the prior written consent of the City, which consent shall not be unreasonably withheld, conditioned or delayed. Any assignment contemplated by this Section shall be made in accordance with a mutually acceptable Assignment Agreement.

2.17 **City’s Expenses.** City expenses incurred in connection with the formation of the District, the negotiation of the Project (including the Development Agreement and the Purchase Agreement, and the legal fees to draft, negotiate and finalize the same), and the implementation of this Agreement, shall be paid by the Developer and/or the Fund. To cover the City’s actual expenditures, the Developer shall pay City for such expenses within 30 days of invoice. Notwithstanding anything contained in this Section to the contrary, the total obligation of the Developer under this Section shall not exceed $40,000. Within this limit the City may elect, at its sole discretion, to collect current or future third-party monitoring and review expenses, and attorneys’ fees, from Tax Increment Revenues for the following types of expenses: attorneys’ fees incurred in the formation of the District, the Project Plan, the Development Agreement, the Purchase Agreement, and negotiating amendments to the same; estimates of project feasibility, and for any certification of Certifiable Reimbursable Project Costs. The City also reserves its right to be reimbursed directly from the Fund for any direct expenditures it incurs in the formation of the District, in lieu of invoicing the Developer.

**Section 3. The Project**

3.01 **The Project.** The Project is comprised of a mixed-use commercial and residential development that will include ground-level retail and commercial spaces (subject to Section 3.04, the “Commercial Space Requirement”), not fewer than 65 loft-style apartment homes (the “Residential Requirement”), and an upscale hotel with meeting spaces (the “Hotel Requirement”). The Commercial Space
Requirement, the Residential Requirement and the Hotel Requirements are sometimes collectively referred to as the “Project Inclusion Requirements.” The Project Plan provides for the design, construction, assembly, and installation of the improvements for the Project, including elements described within the Project Plan as Project Costs and Non-Project Costs, and the full implementation thereof, for each of the Project Inclusion Requirements. The Developer acknowledges that its commitment to construct the Project Inclusion Requirements identified in this section is a material inducement for the City to enter into this Agreement.

The requirements of this Section 3.01 shall cease upon completion of the Project.

(a) The Project consists of the following activities which must be satisfied in order to support the TIF reimbursement contemplated in this Agreement:

(i) Site Remediation. Developer shall remove or remediate contaminated soils and follow state and local requirements for treating any issues found to be on site.

(ii) Public Improvements to the Property and Surrounding Area. Developer shall construct and complete the landscape and hardscape improvements in the public right of way. Developer shall construct a parking lot either on grade, above grade or below ground, to service its development while also providing some generally available parking.

b) The Project also consists of the following Non-TIF Activities: Developer shall construct a mixed use building that will contain residential and commercial spaces in accordance with the Residential Requirement and the Commercial Space Requirement, as well as a mixed-use hotel with convention space in accordance with the Hotel Requirement.

(c) Execution of this Agreement shall not constitute approval of Developer’s use and construction of the Project by the City for purposes of any zoning, building code, or other ordinances and regulations but rather execution hereof shall constitute a good faith belief on behalf of the City that Project as demonstrated by the Developer will be able to meet all City approvals.

(d) Developer shall not alter, amend, modify, enhance, or delete any original Project specifications, plans, and designs as presented to the City in Developer’s Application to the Fund, nor begin construction of the Project without City’s written approval which approval may not be unreasonably withheld, conditioned, or delayed.

3.02 Bidding of the Public Infrastructure Improvements. Public Improvements will be constructed by the Developer through private contracts between Developer and architects, engineers, suppliers, laborers, construction managers, contractors and other persons. The City will not bid nor contract for any improvements described in this Agreement, including any Public Improvements within the Property.

3.03 Financing of the Project and Improvements. Payment of all Project Costs will be made from Developer’s own capital and from other sources obtained solely by Developer.

3.04 Conversion of Commercial Space. Three (3) years following completion of the Building, in the event the owner of the Project determines, in its sole and absolute discretion, that it is unable to lease all of the Commercial Space for its intended commercial use, the owner of the Project may repurpose any or all unleased space for residential or other purposes, as determined by the Project owner, so long as it is consistent with the then applicable zoning of the Property or if such owner has been successfully granted
a variance or other exception to the zoning requirements applicable to the Property, and such re-purposing shall not be in violation of any term or condition hereof.

Section 4. Developer Covenants

4.01 Duties and Obligations of Developer. Subject to Developer’s right to terminate pursuant to the provisions of Section 2.04, Developer hereby agrees to perform each of the following at Developer’s expense in strict accordance with the Project Schedule or otherwise by any specific date set forth in the clauses below:

(a) Complete site development and environmental assessment;
(b) Prepare all necessary engineering and design plans that address all applicable zoning, platting, subdivision, building code, ordinances and regulations for the Project in its entirety, and develop the Project consistent with all applicable regulations and Agreements with the City;
(c) Complete the analysis of necessary Public Infrastructure and street/utility improvements;
(d) Provide the City with preliminary cost estimates for Public Improvements/infrastructure and street/utility improvements;
(e) Pay the usual and customary builder permit fees and permits, and the usual and customary application and development fees of the City;
(f) Obtain or cause to be obtained, all necessary permits and approvals from City and/or all other governmental agencies having jurisdiction over the construction of improvements to the Property;
(g) In accordance with the Purchase Agreement, pay all environmental phase I survey costs associated with development of the project prior to the closing of the Property;
(h) Submit an application for the use of tax increment finance and adhere to applicable terms and conditions of the TIF Agreement;
(i) Complete the Project, including the Project Inclusion Requirements, consistent with Section 3 of this Agreement;
(j) Procure, or cause to be procured, all materials, labor, and services for completing the Project and all goods and other services for infrastructure and construction and site build-out, and be responsible for all aspects of construction and complete, or cause to be completed, all improvements described in the Project Plan and this Agreement within the Project Schedule, time being of the essence, constructed in accordance with the requirements of the applicable City codes and ordinances and the International Building, Mechanical, Plumbing, Electrical, and Fire Codes, in effect at the time of approval of the appropriate building, grading, encroachment or other construction permits for the Project;
(k) Provide the City all necessary information, including documentation of actual expenses incurred for Reimbursable Project Costs; and

4.02 Insurance. Developer will maintain for the duration of the Project a policy of liability insurance, acceptable to City, with liability limits of at least Two Million Dollars ($2,000,000.00) naming City as an additional insured. Such a policy must remain in effect until City provides a final certificate of occupancy. Developer agrees to require the construction contractor installing infrastructure improvements to carry
Builders’ Risk insurance covering the full replacement cost of all improvements and that such insurance remain in effect for the duration of the construction of each respective Project phase. The City will not provide insurance for the Project.

4.03 Indemnification. Developer will without a determination of liability or payment being made FULLY INDEMNIFY, DEFEND, and HOLD HARMLESS, City (and the elected and appointed officials, employees, the Mayor, council members, and representatives of City) (the “Indemnified Parties”) from and against any and all costs, claims, liens, damages, losses, expenses, fees, fines, penalties, proceedings, actions, demands, causes of action, liability and suits of any kind and nature, including but not limited to, personal injury or death and property damage, made upon any of the Indemnified Parties directly or indirectly arising out of, resulting from or related to Developer’s breach of this Agreement and for the negligence, willful misconduct or criminal conduct of Developer under this Agreement, including any such acts or omissions of Developer and its members, managers, agents, officers, representatives, employees, consultants or sub-consultants, and their respective officers, agents, employees, directors and representatives while in the exercise or performance of the rights or duties of Developer under this Agreement, all without, however, waiving any governmental immunity available to City under South Dakota law and without waiving any defenses of the parties under South Dakota law. The provisions of this indemnification obligation are solely for the benefit of the parties hereto and are not intended to create or grant any rights, contractual or otherwise, to any other person or entity. Developer will promptly advise the Indemnified Parties in writing of any claim or demand against the Indemnified Parties related to or arising out of Developer’s activities under this Agreement and will see to the investigation and defense of such claim or demand at Developer’s cost to the extent required in this section. The Indemnified Parties will have the right, at its option and expense, to participate in such defense with attorneys of its choice, without relieving Developer of any of its obligations under this section. The indemnification obligations hereunder survive the expiration and termination of this Agreement.

4.04 Liability. Developer will be solely responsible for compensation and taxes payable to any employee or contractor of Developer, and none of Developer’s employees or contractors will be deemed to be employees or contractors of City. No elected or appointed official, the Mayor, council member, officer, employee, representative or agent of City shall be personally responsible for any liability arising out of or resulting from this Agreement.

4.05 Taxes & Licenses. Developer will pay, on or before their respective due dates, to the appropriate collecting authority all federal, state, and local taxes and fees that are now or may hereafter be levied upon the Property or upon Developer or upon the business conducted on the Property, or upon any of Developer’s property used in connection therewith, including employment taxes. Developer shall maintain in current status all federal, state, and local licenses and permits required for the operation of the business conducted by Developer.

4.06 Examination of Records. Developer will allow City to conduct examinations and copy, during regular business hours and following at least 5 business days’ notice to Developer by City, the books and records related to the sources and uses of funds related to the Project.

4.07 Minimize Project Costs. Developer will use its best efforts to minimize the actual Project Costs but shall not be required to sacrifice the first-class quality or finishes of the Project.
4.08 **Miscellaneous Developer Obligations.** Developer shall be obligated to comply with the terms and conditions of this Agreement, and any amendments hereto, at those times specified herein. Developer shall use its best efforts, in accordance with its business judgment and taking into consideration market conditions and other economic factors influencing the Developer’s business decisions, to commence and continue the development of the Project in a good and workmanlike manner using best construction practices and techniques, and to develop the Project in an orderly and diligent manner in accordance with the provisions and conditions of this Agreement including, without limitation the Project Schedule. The failure of the Developer to comply with any material term or condition or fulfill any obligation of the Developer under this Agreement shall constitute a default by the Developer under this Agreement.

**Section 5. Term and Termination**

5.01 **Term.** The “Term” of this Agreement shall commence on the date the resolution or ordinance approving this Agreement becomes effective and end on the date that is the earliest to occur of the following, at which time Parties’ obligations hereunder will be deemed fully discharged:

(a) the date on which the amount payable under Section 2.05 has been paid in full to Developer;

(b) the date this Agreement is terminated as provided in Sections 2.03 or 6.02;

(c) the 20th anniversary of the creation of the TID;

(d) the Developer’s voluntary or involuntary bankruptcy, insolvency, or transfer for the benefit of creditors;

(e) Dissolution or termination of Developer; or

(f) the City’s repurchase of the Property.

5.02 **Modification on Changed Condition.** The City reserves the right to reserve, reduce, or withhold reimbursements to the Developer based on the following occurrences:

(a) Significant reductions to the overall Project Cost as set forth in the Sources and Uses of Funds Statement which reduce the Developer’s financial need for Tax Increment Revenue. In such instance, the City may seek such adjustment as contemplated in this Agreement any time within thirty-six months of construction completion and modify the total amount payable in Section 2.05(a) by providing written notice to the Developer of its intent to do so. In the event the City determines it intends to reserve, reduce or withhold Tax Increment Revenues, it will give the Developer written notice of its intention to reserve, reduce or withhold Tax Increment Revenues and a detailed basis for the City’s decision (the “City Notice”). Developer will have 60 days within which to respond to the City’s notice in writing as to whether Developer accepts or disagrees with the City’s decision. If Developer disagrees with the City’s decision, the parties agree to meet and attempt to come to a mutual agreement regarding any decision to reserve, reduce or withhold Tax Increment Revenue. If no agreement is reached within 120 days following the date of the City Notice, then either party may within 180 days of the date of the City Notice bring an action pursuant to Section 6 of this Agreement.

(b) A Default by the Developer, which may include, without limitation, any of the following:

(i) Developer’s failure to commence or complete construction in accordance with Section 3.01 or Section 4.01(a); or
(ii) Developer’s breach of any of the terms of this Agreement including, without limitation, those contained in Section 3.01; or

(iii) Any representation or warranty in this Agreement, the Project Plan or the final Sources and Uses of Funds (as approved by the City), made by Developer shall be materially untrue or materially misleading in any respect. The Parties acknowledge that the architect’s, engineer’s and any contractor’s estimates provided to date are a good faith estimate and subject to change; or

(iv) Developer shall file or have filed against it a Petition in Bankruptcy or for reorganization or for an arrangement pursuant to any present or future federal or state bankruptcy act or any similar federal or state law, or shall be adjudged bankrupt or insolvent, or shall make a general assignment for the benefit of its creditors, or shall be unable to pay its debts generally as they become due; or

(v) Commencement of foreclosure or forfeiture proceedings whether by judicial proceedings, self-help, or any other method by Developer’s creditors or any governmental agency.

The City shall be under no obligation to increase reimbursements based on Developer’s need or a modification or changed condition.

5.03 Priority. Any amounts paid by City to Developer shall retain their characterization as real estate taxes and their priority position should Developer default or become bankrupt.

Section 6: Default, Remedies, Termination

6.01 General Provisions. Subject to Force Majeure and extensions of time by mutual consent in writing, failure or unreasonable delay by either Party to perform any term or provision of this Agreement shall constitute a default. In the event of default or breach of any terms or conditions of this Agreement, the Party alleging such default or breach shall give the other Party notice in writing specifying the nature of the alleged default and the manner in which said default may be satisfactorily cured and the defaulting party shall have ninety (90) days to cure its default, time being of the essence. During any such 90-day cure period, the Party alleged to be in default shall not be considered in default for purposes of the institution of legal proceedings.

After notice and expiration of the 90-day cure period (as the same may be extended as provided above), if such default has not been cured, then in addition to remedies as specifically provided below, the other Party to this Agreement may at its option:

(a) Terminate this Agreement, in which event neither Party shall have any further rights against or liability to the other with respect to this Agreement or the Property; or

(b) Institute legal or equitable action to cure, correct or remedy any default, including but not limited to an action for specific performance of the terms of this Agreement.

6.02 Developer’s Default, City Termination Rights. So as to avoid all doubt, Developer agrees that the City, in addition to any other remedies set forth herein, has the right to terminate this Agreement on ninety (90) days prior written notice under the following circumstances, each of which is a default hereunder:
(a) In the event of a default of Developer in which it has received notice pursuant to Section 6.01 herein and which has not been cured within the time period provided for herein;

(b) Failure of Developer to submit applications for land use and building permit approvals by the deadline required herein or in the Purchase Agreement;

(c) Failure by Developer to commence construction of the Project in accordance with Section 3.01 and Section 4.01(a) on or prior to July 1, 2023;

(d) Failure by Developer to pursue construction of the Project diligently upon commencement of construction;

(e) Failure by Developer to provide and maintain the financial assurances as required in Section 7.11 including, without limitation, the withdrawal of a financial commitment by a Financier or provider of capital without the immediately replacement of such commitment for financing or capital in a manner satisfactory to the City as provided in Section 7.11;

The parties agree that the instrument transferring title to the Property will contain a reversionary clause that title of the Property will revert back to the City if the Project is abandoned or this Agreement is terminated. In particular, if the Developer exercises its right to terminate pursuant to Section 2.04 of this Agreement the parties acknowledge that title to the Property will revert to the City. The parties further agree that once financing commitments are in place, the City’s rights and interest in the Property will be subordinate to any rights and interests of entities financing the Project. The parties agree to work together to execute any and all documents or assurances necessary to fulfill this provision so as not to impede the Developer’s ability to obtain financing for the Project. Upon completion of the Project and issuance of a final certificate of occupancy for the Hotel Requirement and the Residential Requirement of the Project, the City’s rights in the Property and any reversionary interest therein shall cease, terminate, and be extinguished.

Termination of this Agreement pursuant to this Section shall not affect any right or duty arising from entitlements issued by City prior to termination, nor shall it destroy any vested right arising from the completion of construction in good faith reliance on an entitlement. The Parties shall record an appropriate release upon termination of this Agreement as to all or any part of the Property. For avoidance of doubt, in the event of an uncured default by Developer, the City shall be entitled to exercise its reversionary rights with respect to the Property and any improvements made thereon by Developer shall be subject to forfeiture.

6.03 City’s Default; Developer Remedies If a City default occurs (and is not cured within the 90-day cure period) before City conveys the Property to Developer, Developer may, at its option: (a) terminate this Agreement by written notice to City without waiving any cause of action Developer may have against City, or (b) a legal action in mandamus, specific performance or other injunctive or declaratory relief to enforce the City’s obligations under this Agreement.

6.04 Non-Waiver; Limitation of Legal Actions. Any delay by a Party in instituting or prosecuting any such actions or proceedings or otherwise asserting its rights under this Section 6 shall not operate as a waiver of such rights or to deprive it of or limit such rights in any way (it being the intent of this provision that such Party should not be constrained because of concepts of waiver, laches or estoppel so as to avoid the risk of being deprived of or limited in the exercise of the remedy provided in this section or otherwise to exercise such remedy at a time when it may still hope otherwise to resolve the problems created by the default involved); nor shall any waiver in fact made by a Party with respect to any specific default by the
other Party be considered or treated as a waiver of the rights of a Party with respect to any other defaults by the other Party or with respect to any particular default except to the extent specifically waived. Except as otherwise expressly stated in this Agreement, the rights and remedies of the Parties are cumulative, and the exercise by either Party of one or more of such rights or remedies shall not preclude the exercise by it, at the same or different times, of any other rights or remedies for the same default or any other default by the other Party.

6.05 Enforced Delay, Extension of Times of Performance. In the event litigation is initiated by any party other than Developer that challenges any of the approvals for the Project and an injunction or temporary restraining order is not issued. Developer may elect to have the term of this Agreement and the Project Schedule tolled (i.e., suspended) during the pendency of said litigation, upon written notice to City from Developer. The tolling shall commence upon receipt by the City of written notice from Developer invoking this right to tolling. The tolling shall terminate upon the earliest date on which either a final order is issued upholding the challenged approvals or said litigation is dismissed with prejudice by all plaintiffs. In the event a court enjoins either the City or Developer from taking actions with regard to the Project as a result of such litigation that would preclude any of them from enjoying the benefits provided by this Agreement, then the term of this Agreement shall be automatically tolled during the period of time such injunction or restraining order is in effect.

Section 7. Miscellaneous

7.01 Non-Waiver. Provisions of this Agreement may be waived only in writing. No course of dealing on the part of City or Developer, nor any failure or delay by City or Developer in exercising any right, power, or privilege under this Agreement shall operate as a waiver of any right, power or privilege owing under this Agreement.

7.03 Entire Agreement. This Agreement, along with any Purchase Agreement for the transfer of the subject property, embodies the final and entire agreement between the parties hereto concerning the subject matter herein. The Exhibits attached to this Agreement are incorporated herein and shall be considered a part of this Agreement for the purposes stated herein, except that if there is a conflict between any such Exhibit and a provision of this Agreement, the provision of this Agreement will control.

7.04 Amendments. All amendments to this Agreement and the Project Plan may only be made in a writing executed by City and Developer, after obtaining all necessary approvals.

7.05 Severability. If any clause or provision of this Agreement is held invalid or unenforceable, such holding will not invalidate or render unenforceable any other provision hereof.

7.06 Force Majeure. Neither the City nor Developer, as the case may be, shall be considered in breach of or in default of any of its nonmonetary obligations hereunder, including without limitation suspension of construction activities, by reason of unavoidable delay due to strikes, lockouts, acts of God, epidemics, pandemics, unforeseeable inability to obtain labor or materials due to governmental restrictions, riot, war, hurricane, or other similar causes beyond the commercially reasonable control of a party (in each case, an event of “Force Majeure”) and the applicable time period shall be extended for the period of the Force Majeure event. However, financial or economic considerations or difficulties unrelated to the aforementioned events are not included in the definition of “Force Majeure.”
7.07 Venue and Governing Law. This Agreement shall be construed under and in accordance with the laws of the State of South Dakota. Any legal or equitable action or proceeding brought or maintained, directly or indirectly, as a result of this Agreement shall be heard and determined in the Seventh Judicial Circuit, Pennington County, South Dakota. The City shall be awarded its attorney’s fees and all other litigation, mediation, and court costs, and expert witness fees if City is the prevailing party.

7.08 Notice. Any notice sent under this Agreement shall be written and mailed with sufficient postage, sent by overnight delivery service or by certified mail, return receipt requested, documented facsimile or delivered personally to an officer of the receiving party at the following addresses:

If to City: City of Rapid City
300 6th Street
Rapid City, South Dakota 57701
Attention: TIF Administrator

With copy(ies) to (which shall not constitute notice):
Joel Landeen, City Attorney
300 6th Street
Rapid City, South Dakota 57701

If to Developer: C.R. Lloyd Associates, Inc.
101 S. Reid Street, Suite 201
Sioux Falls, South Dakota 57103
Attn: Jake Quasney, EVP of Development

With copy(ies) to (which shall not constitute notice):
Lloyd Companies, Inc.
101 S. Reid Street, Suite 201
Sioux Falls, South Dakota 57103
Attn: Dan Doyle, General Counsel

Any of the above parties may, by notice given hereunder, designate any further or different addresses to which subsequent notices, certificates, or other communications may be sent.

7.09 Captions. Captions used herein are only for the convenience of reference and shall not be construed to have any effect or meaning as to the agreement between the parties hereto.

7.10 Covenants Running with the Land; Binding Effect. All provisions of this Agreement shall be enforceable as equitable servitudes and constitute covenants running with the land. Each covenant to do, or refrain from doing, some act with regard to the development of the Property: (a) is for the benefit of and is a burden upon the Property; (b) runs with the Property and each portion thereof; and (c) is binding upon each Party and each successor in interest during ownership of the Property or any portion thereof.

7.11 Financial Assurances and Covenants. Prior to transfer of title in the Property to the Developer, the Developer agrees to provide information reasonably satisfactory to the City and the City’s financial advisor that the Developer has secured financing and/or other lawful capital means sufficient to adequately finance the successful completion of the Project (in its entirety) and satisfy Developer’s obligations in this Agreement in a timely manner. An enforceable commitment letter for such financing from a lender(s) or
other financial institution reasonably acceptable to the City, and the identification of the source of such capital and the escrowing of such capital obligations (or a date-certain commitment to escrow), shall satisfy this provision. The City and its financial advisor agree to consider such information as proprietary and confidential. Developer acknowledges that its warranties, representations and covenants regarding the financing of the Project are an inducement to the City to award the development to Developer and enter into this Agreement.

7.12 Financing. Developer may, in its sole discretion, obtain or allow one or more financial encumbrances (i.e., mortgages, deeds of trust, and any other device by which Developer uses all or any portion of its interest in the Property to secure a loan) as will assist Development of the Project. Unless otherwise required by law, neither entering into nor a breach of this Agreement shall defeat, render invalid, diminish or impair the lien of any such financial encumbrance made in good faith and for value provided, however, that such financial encumbrances are and must be subject and inferior to the terms and conditions of this Agreement, including the remedies hereunder. Nothing herein authorizes Developer to encumber any interest in the Property other than its own. The City agrees to provide any Financier with a copy of any default notice to Developer.

7.13 Cross Default. The parties acknowledge and agree that a default by a party under the Purchase Agreement and/or TID Agreement shall be deemed a default of this Agreement.

[Signature Page Follows]
IN WITNESS THEREOF, the parties hereto have caused this instrument to be duly executed as of the day and year first written above.

City of Rapid City

__________________________
Mayor Steve Allender

Attest:

__________________________
Pauline Sumption, Finance Director

(SEAL)

C.R. Lloyd Associates, Inc.

__________________________
By: ________________________
Its: ________________________
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<th>Exhibit</th>
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<td>Exhibit A</td>
<td>TID 85 Resolution</td>
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<td>Exhibit B</td>
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<td>Exhibit C</td>
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