

THIRD ASSIGNMENT AGREEMENT FOR TAX INCREMENT DISTRICT NO. 38 BETWEEN THE CITY OF RAPID CITY, HEARTLAND RETAIL CENTER, LLC, AND CORTRUST BANK

THIS ASSIGNMENT AGREEMENT (“Agreement”) is entered into by **Heartland Retail Center, LLC**, a South Dakota limited liability company, at 24054 Palmer Gulch Road, Hill City, SD 57745 (“Developer”), the **City of Rapid City**, a municipal corporation and political subdivision of the State of South Dakota, at 300 Sixth Street, Rapid City, South Dakota 57701 (“City”), and **CorTrust Bank, NA**, at 26 West 7th Avenue, P.O. Box 60, Webster, SD 57274 (“Lender”). The above-referenced parties may be collectively referred to herein as the “Parties.”

WHEREAS, the City of Rapid City created Tax Increment District Number Thirty-Eight by resolution dated February 17, 2003, pursuant to Chapter 11-9 of the South Dakota Codified Laws; and

WHEREAS, on February 17, 2003, the City also adopted by resolution a Project Plan for Tax Increment District Number Thirty-Eight which identifies expenditures for public improvements that qualify as project costs pursuant to SDCL 11-9-14 and SDCL 11-9-15; and

WHEREAS, on April 21, 2003, the City and Developer entered into a Contract for Private Development Tax Increment District Number Thirty Eight (“Original Contract”); and

WHEREAS, on September 25, 2003, Developer assigned its rights to payment from Tax Increment District Number Thirty-Eight funds to First Western Bank in order to secure financing to construct the public improvements contemplated in the Original Contract; and

WHEREAS, on May 24, 2004, the parties entered into an Amendment to Contract for Private Development for Tax Increment District No. 38 (“First Amended Contract”) providing that the City would pay Developer to construct improvements to a water main and that the City could be reimbursed out of the TIF funds once the Developer is fully paid for its project costs; and

WHEREAS, in June 2008, the parties entered into a Second Assignment Agreement with Great Western Bank where Developer assigned its rights to payment under the Original Contract to Great Western Bank and the City consented to this assignment upon proof of satisfaction of Developer’s obligations to First Western Bank (“Second Assignment Agreement”); and

WHEREAS, in conjunction with the Second Assignment Agreement, First Western Bank released the parties from their obligations to pay it funds out of Tax Increment District Number Thirty-Eight; and

WHEREAS, by resolution approved on February 6, 2017, the City approved Revision #2 Project Plan for Tax Increment District Number Thirty-Eight which reallocated project costs within the tax increment district; 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 Revision #2 Project Plan; and

WHEREAS, in March 2017, Developer and City entered into a “Second Amended Contract for Construction of Public Improvements Through Private Developer Tax Increment District Number Thirty-Eight” (“Second Amended Contract”) which sets forth the terms and conditions under which the Developer is paid out of the Tax Increment District Thirty-Eight Fund; and

WHEREAS, Developer has been able to obtain financing at a more favorable interest rate from Lender and is requesting that it be allowed to pay off the loan to Great Western Bank and assign the proceeds from Tax Increment District Number Thirty-Eight to Lender; and

WHEREAS, it appears that refinancing at a lower interest rate will result in savings in the amount of interest paid over the life of the Tax Increment District; and

WHEREAS, the parties are in agreement that paying off the Great Western Bank loan and refinancing with Lender is in the parties’ best interest.

NOW, THEREFORE, in consideration of the mutual covenants, agreements, representations, and warranties set forth herein, the Parties agree as follows:

1. Release of Second Assignment Agreement. Developer agrees to satisfy any obligations it has to Great Western Bank based on the Second Assignment Agreement and financing it previously obtained. Upon proof that it has satisfied its obligations to Great Western Bank, the City consents to the assignment of the proceeds to Tax Increment District Number Thirty-Eight to Lender. This consent is conditioned upon the interest rate Lender is charging being less than the interest being charged by Great Western Bank.

2. City’s Payment to Lender. City will pay directly to Lender those positive tax increments which are collected by the City and deposited in the Fund described in Section 7 of the Original Contract and which are due to Developer pursuant to the Original Contract and Second Amended Contract until Developer’s loan obligation to Lender is paid in full or the Tax Increment District is dissolved, whichever comes first. “Developer’s loan obligation” as used in this Agreement is Developer’s debt to Lender for public improvements approved as Project Costs in any Project Plan for Tax Increment Financing District Thirty-Eight; Developer’s loan obligation does not include debt of Developer to Lender for improvements which are not Project Costs within any Project Plan approved for Tax Increment Financing District Thirty-Eight. It is the specific intent

of the Parties that the City is not obligated to pay any sums to Lender other than the amounts due to Developer under the Original Contract and Second Amended Contract. Any obligation the City has to Lender shall cease by the City's paying to Lender the tax increments collected until Developer's loan obligation is satisfied or Tax Increment Financing District Thirty-Eight is terminated, whichever comes first. Payments will be made at 300 Sixth Street, Rapid City, South Dakota 57701, or at a different location if required by Lender.

3. Insufficient Increments to Pay Developer's Loan Obligation. Lender agrees that, if City makes payment to Lender of all funds due to Developer under the Original Contract and Second Amended Contract, there is no liability by City for Developer's loan obligation and that Lender shall look solely to its loan agreement(s) with Developer and Developer's guarantors, if any, for any rights of recovery upon default. If Tax Increment District Thirty-Eight is terminated before Lender is paid in full for Developer's loan obligation or if the increments are insufficient to pay Developer's loan obligation, Lender's sole recourse shall be against Developer and its guarantors, and the City shall have no liability to Lender.

4. Exchange of Information. Upon reasonable request and notice, Lender agrees to provide financial reports to City and Developer to advise them of the ongoing status of the loan obligation to Lender by Developer. Upon reasonable request and notice, City agrees to provide information to Lender to advise about the completion of public improvements and the certification of costs of improvements made in Tax Increment District Thirty-Eight.

5. Developer's Payments to Lender. All Parties to this Agreement acknowledge that City's obligation to pay pursuant to this Agreement remains even if Developer makes payments to Lender for the Developer's loan obligation. The Parties agree that City's obligation to pay Lender continues regardless of payments Developer makes to Lender until Lender has been paid in full for Developer's loan obligation or until Tax Increment District Thirty-Eight is dissolved, whichever comes first.

6. Lender Bound by Original Contract and Second Amended Contract. Lender agrees to be bound by the terms of the Original Contract and the Second Amended Contract between City and Developer. The Parties agree that City's obligation for payment in this Agreement is limited to those amounts set forth in the Original Contract and the Second Amended Contract.

7. Counterparts. This Agreement may be executed in counterparts and by different parties on different counterparts with the same effect as if the signatures thereto were on the same instrument. This Agreement shall be effective and binding upon the Parties as of the date in which all parties have executed a counterpart of this Agreement.

8. Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective heirs, executors, personal representatives, successors and assigns.

9. Entire Agreement. This Agreement, together with the related written agreements specifically referred to herein, represents the only agreement among the parties concerning the subject matter of this contract and supersedes all prior agreements, whether written or oral, relating to the subject matter of this agreement.

10. Modification and Waiver. No purported amendment, modification, or waiver of any provision hereof shall be binding unless set forth in a written document signed by all Parties (in the case of amendments or modifications) or by the party to be charged thereby (in the case of waivers). Any waiver shall be limited to the circumstance or event specifically referenced in the written waiver document and shall not be deemed a waiver of any other term hereof or of the same circumstance or event upon any recurrence thereof.

11. Governing Law and Venue. This Agreement and the legal relations between the Parties shall be governed by and construed in accordance with the laws of the State of South Dakota, and venue for any dispute arising hereunder shall be exclusively in a court of competent jurisdiction in Pennington County, South Dakota.

12. Invalid Provisions and Waiver. If any term, restriction, or covenant of this Agreement is deemed illegal or unenforceable, all other terms, restrictions and covenants hereof shall remain unaffected to the extent permitted by law. No waiver by any party of any default, misrepresentation or breach of any representation, warranty or covenant hereunder, whether intentional or not, shall be deemed to extend to any prior or subsequent default, misrepresentation, or breach of any representation, warranty or covenant hereunder or affect in any way any rights arising by virtue of any default, misrepresentation or breach of any representation, warranty or covenant prior to or subsequent to such occurrence.

IN WITNESS WHEREOF, each of the Parties hereto has caused this Agreement to be executed in the manner appropriate to each as of the Effective Date.

[SIGNATURE PAGES TO FOLLOW]

Dated this ____ day of _____, 2017.

CITY OF RAPID CITY

Steve Allender, Mayor

ATTEST:

Finance Officer
(SEAL)

State of South Dakota)
 ss.
County of Pennington)

On this the _____ day of _____, 2017, before me, the undersigned officer, personally appeared Steve Allender and Pauline Sumption, who acknowledged themselves to be the Mayor and Finance Officer, respectively, of the City of Rapid City, a municipal corporation, and that they, as such Mayor and Finance Officer, being duly authorized to do so, executed the foregoing instrument for the purposes herein contained by signing the name of the City of Rapid City by themselves as Mayor and Finance Officer.

IN WITNESS WHEREOF I hereunto set my hand and official seal.

Notary Public, South Dakota

My Commission Expires:
(SEAL)

Dated this _____ day of _____, 2017.

HEARTLAND RETAIL CENTER, LLC

By: _____
Its: _____

State of South Dakota)
 ss.
County of Pennington)

On this the _____ day of _____, 2017, before me, the undersigned officer personally appeared _____, who acknowledged himself/herself to be the _____ of Heartland Retail Center, LLC, and that as such, being duly authorized to do so, executed the foregoing instrument for the purposes herein contained.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

Notary Public, _____

My Commission Expires:
(SEAL)