

**COUNCIL ACTION FORM**

**SUBJECT:** Sale of Property and Agreements with Prairie Fire Corporation and Builder's Development Corporation in conjunction with a Low-Income Housing Tax Credit (LIHTC) Application for a multi-family housing development in the Baker Subdivision (321 State Avenue).

**BACKGROUND:**

At the October 27<sup>th</sup> City Council meeting, the City Council selected Prairie Fire Development Corporation as the preferred developer to partner with the City to prepare and submit a LIHTC application for multi-family housing in the Baker Subdivision, 321 State Avenue (see attachment A) to the Iowa Finance Authority (IFA) in March 2021.

Prairie Fire Development was chosen based upon their housing development experience (including LIHTC projects), their unique proposed building design and layout, two rental housing types (apartments and townhouses) of which 87% would be made affordable to households at 60% of less of the Ames Area Media Income Limits), and the ability of their proposed project to receive the highest LIHTC points possible (155 pts) for a project at this location.

**As part of the proposal, Prairie Fire offered to purchase the site for \$2,500, contingent on receiving tax credit approval. Additionally, Prairie Fire must demonstrate site control of the property at the time of submitting the LIHTC application to IFA. This requires that Prairie Fire and the City enter into an Option Agreement to transfer the property to Prairie Fire prior to submitting their LIHTC application.** With the Option Agreement the City is committed to transferring the property to Prairie Fire, subject to its terms (one of which is the approval of the LIHTC incentive), for a period of nine months from the time of the application submittal. In order to comply with state law concerning the transfer or sale of public property, a public hearing must be held before entering into the Option Agreement. Thereby, at their December 8, 2020 City Council meeting, City Council set December 22, 2020 as the date of public hearing for this proposed sale through an Option Agreement.

City Council should note that Prairie Fire will be creating a joint venture with Builder's Development Corporation (BCD), a non-profit entity that will be responsible for the on-site management of the units, to develop the project, prior to the submittal of the application to IFA. This will require an addendum to the Option Agreement when this occurs.

**In addition to the Option Agreement the City, Prairie Development and Builder's Development Corporation will be entering into a development agreement.** The Developer's Agreement lays out the terms and conditions of both parties for meeting the application requirements set forth by IFA, that includes: Definitions and Rules of

Construction; Representation, Warranties and Covenants; Restrictions On Us; Conditions Precedent to Developer's Performance; Pre-Construction Activities; Construction of Infrastructure; Property Transfer; Development Plan & Construction of Project Improvements; Default and Termination; Estoppel; Special Covenant and Damages for Breach; Risk of Loss and Insurance; Compliance with Applicable Laws; Liens; Indemnification; Assignment; Equal Employment Opportunity; American with Disabilities; and Miscellaneous Provisions.

**Attached for the City Council's review and approval are copies of the Option Agreement and the Developer's Agreement. It should be noted that prior to the City Council meeting, the documents were posted on the City's housing website at [www.cityofames.org/housing](http://www.cityofames.org/housing).**

Subsequent to approving the development agreement with Prairie Fire, the developer will work on updates to the Concept Plan based upon the discussion by City Council on October 27th and staff's preliminary review comments addressing site layout, units, and appearance. An updated Concept Plan will be presented to City Council for acceptance in February in order to finalize the LIHTC application for March. A final Development Plan will be approved at a later date by City Council if the project is approved for LIHTC.

#### **ALTERNATIVES:**

1. City Council can adopt a resolution approving:
  - a. The Option Agreement for the sale of the site to Prairie Fire Development; and
  - b. The Developer's Agreement between the City of Ames, Prairie Fire Corporation and Builder's Development Corporation. The City will then partner with them to submit a LIHTC application to IFA for multi-family housing units in the Baker Subdivision (321 State Avenue) by the March 10, 2021 application deadline.
2. City Council can adopt a resolution a) the Option Agreement for the sale of the site to Prairie Fire Development; and b) the Developer's Agreement between the City of Ames, Prairie Fire Corporation and Builder's Development Corporation. The City will then partner with them to submit a LIHTC application to IFA for multi-family housing units in the Baker Subdivision (321 State Avenue) by the March 10, 2021 application deadline **with modifications**.
3. City Council can decline to adopt a resolution approving a) the Option Agreement for the sale of the site to Prairie Fire Development; and b) the Developer's Agreement between the City of Ames, Prairie Fire Corporation and Builder's Development Corporation.

### **CITY MANAGER'S RECOMMENDED ACTION:**

Staff has been working diligently with Prairie Fire and Builder's Development Corporation to finalize the Developer's Agreement that addresses the desire of the City to move forward with a LIHTC application that meets the IFA requirements. The concept plan will be updated by the developer prior to submitting the application in March, but final Site Development Plan and building permit plans will not be prepared unless the developer receives an award of tax credits. Award of tax credits is expected in August 2021. The developers then would complete design and site acquisition in the winter with a plan for construction to begin spring of 2022 and a plan for occupancy to begin in the summer of 2023.

The Option Agreement will bind the sale of the property, subject to its terms, to Prairie Fire for a period of nine months from the submittal of the LIHTC application. Additionally, approval of the Development Agreement identifies City and developer obligations for building affordable housing, include the City's reservation of at least \$250,000 of local HOME funds.

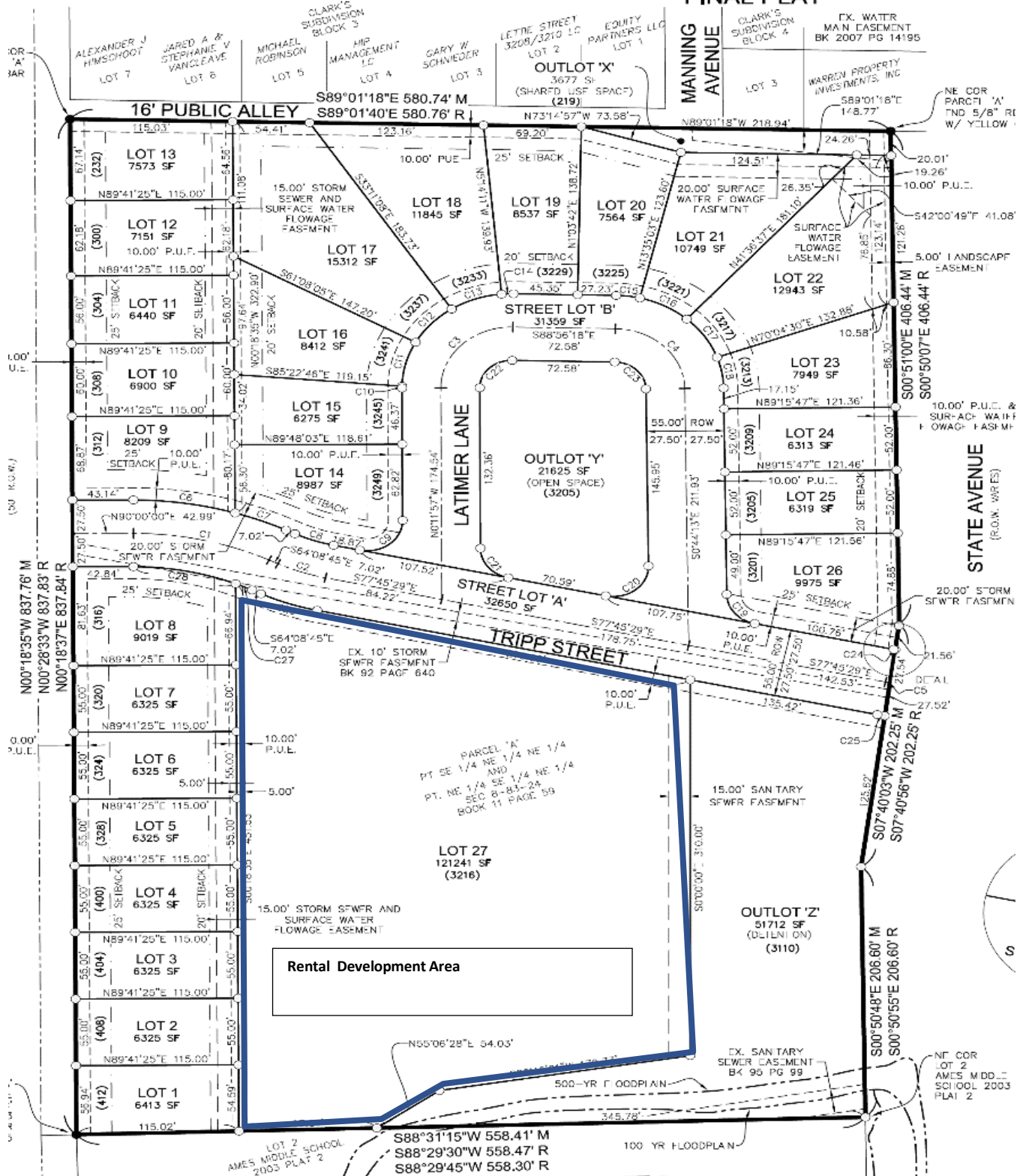
As noted during the October meeting, HOME funds are separate from CDBG funds and can be used to directly assist in the construction of affordable housing. To date, the City has been allocated three years (2018-2021) of HOME funding, which has an approximate balance of \$1.2 million dollars (not including program administration). The City can consider utilizing up to approximately \$500,000 of HOME Funds for this LIHTC project without compromising use of the funds for the construction of single-family homes on the north side of the subdivision. Developer assistance with HOME funds would not occur until after award and closing on the acquisition of the property in 2022. **Also, the exact amount of HOME funds request may need to be adjusted depending if Davis Bacon wage rates would be required on the project.**

**Therefore, it is the recommendation of the City Manager that the City Council adopt Alternative #1 thereby approving the attached a) Option Agreement to purchase Lot 27 of the Baker Subdivision for \$2,500 by the Prairie Fire Corporation and Builder's Development Corporation and b) Developer's Agreement between the City of Ames, Prairie Fire Corporation and Builder's Development Corporation.**

# ATTACHMENT A--Location Map

## BAKER SUBDIVISION

### FINAL PLAT



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S P A C E   A B O V E   R E S E R V E D   F O R   O F F I C I A L   U S E

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**Return document to:** City Clerk, 515 Clark Avenue, Ames IA 50010

**Document prepared by:** Victoria A. Feilmeyer, City of Ames Legal Department, 515 Clark Ave., Ames, IA 50010 – 515-239-5146

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### ***OPTION AGREEMENT FOR PURCHASE OF REAL ESTATE***

**THIS AGREEMENT**, made and entered into on this \_\_\_\_\_ day of December 2020, (the Effective Date”), by and between Prairie Fire Development Group, LLC, whose address for the purpose of this Agreement is 770 East 5<sup>th</sup> Street, Kansas City MO 64106, (the “Buyer”) and the City of Ames, Iowa, a Municipal Corporation, (the “City”) whose address for the purpose of this Agreement is 515 Clark Avenue, Ames, IA 50010.

**WHEREAS**, the City owns the real property legally known as “Lot 27, Baker Subdivision, Ames, Story County, Iowa” (the “Real Estate”).

**WHEREAS**, Buyer desires to obtain an option, in accordance with the terms herein, to purchase the Real Estate from the City, subject to the terms outlined below.

**WHEREAS**, the Parties have reached an agreement on the terms and provisions for the option to purchase and wish to herein reduce their agreement to writing for formal execution and acknowledgement.

**IT IS THEREFORE AGREED** as follows, to-wit:

1. **Optioned Property:** City hereby grants to Buyer the exclusive right of option to purchase the Real Estate legally described above.
2. **Option Payment:** City hereby acknowledges as consideration for this option, the receipt of the sum of ten dollars and no cents (\$10.00), plus the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged.
3. **Option Term:** Buyer shall have the exclusive right to exercise the option for a period of nine (9) months following the 2021 Iowa Finance Authority low income housing tax credit (“LIHTC”) application due date as established by the 2020-2021 Nine Percent (9%) Qualified Action Plan. In the event Buyer fails to file said application by said

established due date, or in the event Buyer does not receive the LIHTC award, Buyer shall notify City within ten (10) business days after the due date or the date that the Iowa Finance Authority notifies the public of the LIHTC awards of such non-award, which ever date applies first, and this Agreement shall automatically terminate, the Option shall expire, and neither Party shall have any further rights and/or duties hereunder.

4. **Purchase Price:** The purchase price to be paid by Buyer shall be two thousand five hundred dollars and no cents (\$2,500.00) (the "Purchase Price").
5. **Closing:** Unless the Parties mutually agree to a deferred date, possession shall be delivered and closing shall occur within thirty (30) days after Buyer exercises said option, execution of the below noted Development Agreement, and delivery by the City of an abstract showing marketable title. For this Agreement, both Parties acknowledge that time is of the essence. At Closing, Buyer shall deliver to the Closing Agent the following:
  - a. An electronic wire transfer of good federal funds in the amount of the balance of the cash portion of the Purchase Price, plus all other applicable costs, expenses and fees.
  - b. The Settlement Statement prepared by the Closing Agent and executed by Buyer.
  - c. All other documents reasonably required by the Closing Agent to satisfy the remainder of its requirements described in the Commitment.
6. **Access to Real Estate:** City agrees that during the Option Term, Buyer and Buyer's employees, designated agents and contractors shall have the right upon 24 hours advanced notice to the City (or shorter time period if approved by City) to enter the Real Estate for purposes of conducting any inspections and/or tests as provided hereunder. Buyer, at its sole expense, may inspect and make soil and other tests at any reasonable time during the Option Term. Buyer agrees to repair any damage to the Property caused by Buyer's exercise of its rights under this section. Buyer shall indemnify and hold City harmless with respect to all costs and expenses (including, without limitation reasonable attorneys' fees) incurred by City due to Buyer's (i) entry onto the Real Estate, and (ii) failure to repair any damage to the Real Estate caused by Buyer's entry onto the Real Estate. This provision shall survive the Closing or termination of this Agreement.
7. **City's Representations and Warranties:** As a material inducement to the execution and delivery of this Agreement by Buyer and the performance by Buyer of its duties and obligations hereunder, City does hereby warrant and represent to Buyer of the Effective Date, and as of the date of Closing:
  - a. **Information:** Except as set forth herein, City has no knowledge of any information affecting the Real Estate that has or would have a material adverse impact on Buyer's ability to use, lease and operate the Real Estate for Buyer's

intended use, herein defined as for the purposes of constructing housing as applied for in the 2021 Iowa Finance Authority LIHTC application.

- b. **Legal Compliance:** To the best of the City's knowledge, and except as disclosed in writing to Buyer prior to the expiration of the Option Term, there are no past or continuing violation, or alleged violation, of any legal requirement affecting the Real Estate; including, without limitation, any past or continuing violation or alleged violation of any local, state or federal environmental, building, zoning, subdivision, fire or other law, statute, ordinance, code, regulation rule or order (collectively, "Laws").
  - c. **Litigation:** To the best of the City's knowledge, there are no pending or threatened claims, actions, suits, litigation or governmental proceeding affecting the Real Estate or which could result in a potential lien against the Real Property.
  - d. **Other Agreements:** To the best of the City's knowledge, there are no agreements or understandings, oral or written, with any person, entity or governmental authority affecting the Real Estate which could give rise to claims affecting the Real Estate.
  - e. **Governmental Actions:** To best of the City's knowledge, there are no threatened or pending condemnation or eminent domain proceeding, special assessment, rezoning or moratorium affecting the Real Estate.
  - f. **Environmental Matters:** To the best of the City's knowledge, the Real Estate in not in violation of any environmental laws.
  - g. **Authority:** City has the full right, power and authority to sell, convey and transfer the Real Estate as provided in this Agreement. The execution and delivery of this Agreement is, and the execution and deliver of all documents required of City hereunder when delivered by City will be, duly authorized, validly and legally binding upon City and enforceable in accordance with their respective terms, and City shall provide such documentation to Buyer and to the Closing Agent sufficient to evidence such authority.
8. **Development Agreement & Updated Concept Plan:** This Agreement is contingent upon both Parties mutually agreeing to and executing a concurrent Development Agreement between the Parties. This Agreement is also contingent upon the Buyer submitting for approval an updated Concept Plan as identified in Section 5.01(a)(i) of the concurrent Development Agreement, which shall include, but not be limited to, development plans for the vacant lot, time lines for said development, and possible incentives offered by City for Completion of said Development.
  9. **Abstract and Title:** Seller agrees to deliver forthwith to Buyer for Buyer's examination an abstract of title to the Real Property continued at Seller's expense to the date of this Agreement showing merchantable title in conformity with this Agreement, Iowa State Bar Association's Iowa Land Title Standards, and Iowa land title law. After Buyer's examination, the abstract shall be held by Seller. With delivery

of the deed, Seller shall deliver the abstract to Buyer. Seller agrees to pay for any additional abstracting which may be required by acts, omissions or change in the legal status of Seller occurring before delivery of deed.

10. **Real Property Taxes.** The City shall be responsible for all property taxes, if any, due on the property prior to the closing date. Buyer agrees to pay, before they become delinquent, all other real property taxes levied upon the Real Property.
11. **Assessments:** City shall pay all assessments which are liens as of the date of closing.
12. **Insurance:** City shall retain liability insurance on the premises until the date of closing when possession is transferred to buyer.
13. **Deed:** Upon payment of the purchase price, City shall execute and deliver to Buyer or its successor or assign a Deed conveying to Buyer the City's interest in the real property, in fee simple absolute, free and clear of all liens, and encumbrances, except those excepted only for recorded easements.
14. **Condition of the Property:** City shall maintain the Real Property in the condition substantially the same as it exists on the date of this Agreement until the date of Closing, except as provided by this Agreement and except for ordinary wear and tear.
15. **Failure to Exercise Option:** In the event Buyer fails or neglects to timely exercise the option or in any other manner fails to timely fulfill the terms of this Agreement, all sums paid to the City shall be forfeited to and become the property of City and neither party shall have any further rights or claims against the other.
16. **Assignment:** It is expressly agreed and understood that neither Party shall assign their interest and/or benefits of this Agreement without first obtaining prior written consent from the other Party. Either Party may choose to refuse consent of said assignment for any reason or for no reason at all.
17. **Successors and Assigns:** Should either party agree to allow an assignment of this Agreement, this Agreement shall become binding upon and insures to the benefit of successors and assigns.
18. **Entire Agreement:** This instrument constitutes the entire agreement between the parties with respect to the subject matter thereof and supersedes all prior oral or written agreements, statements, representations, and promises. No addition to or change in the terms of this Agreement shall be binding upon the parties unless it is expressed in a writing signed by the parties.
19. **Modification of Agreement:** Any modification of this Agreement or additional obligation assumed by either party in connection with this Agreement shall be binding only if evidenced in writing signed by each party.
20. **Interpretation:** This Agreement shall be governed exclusively by and construed in accordance with the laws of the State of Iowa. The paragraph headings in this Agreement are for convenience only and in no way define or limit the scope or intent of any provisions of this Agreement. This Agreement may be executed in any number



of counterparts, each of which shall be regarded as an original and all of which shall constitute but one and the same instrument.

21. **Governing Law:** This Agreement and rights and duties hereunder shall be construed in accordance with the laws of the state of Iowa. Venue for any dispute shall be in the appropriate state or federal court in the State of Iowa.
22. **Section Headings:** The titles to the Sections of this Agreement are solely for the convenience of the Parties and shall not be used to explain, modify, simplify, or aide in the interpretation of the provisions of this Agreement.

[ S I G N A T U R E   P A G E S   T O   F O L L O W ]

**PRAIRIE FIRE DEVELOPMENT  
GROUP, LLC**

Dated \_\_\_\_\_, 2020.

By:

\_\_\_\_\_  
Kelley Hrabe, Manager

**STATE OF \_\_\_\_\_, COUNTY OF \_\_\_\_\_, SS.:**

This instrument was acknowledged before me on December \_\_\_\_\_, 2020, by Kelley Hrabe, as Manager of Prairie Fire Development Group, LLC.

\_\_\_\_\_  
**NOTARY PUBLIC**

Passed and approved on \_\_\_\_\_, 2020, by Resolution No. 20 - \_\_\_\_\_ adopted by the City Council of the City of Ames, Iowa.

**CITY OF AMES, IOWA**

By:

\_\_\_\_\_  
**John A. Haila, Mayor**

Attest:

\_\_\_\_\_  
**Diane R. Voss, City Clerk**

**STATE OF IOWA, COUNTY OF STORY, SS.:**

This instrument was acknowledged before me on \_\_\_\_\_, 2020, by John A. Haila and Diane R. Voss, as Mayor and City Clerk, respectively, of the City of Ames, Iowa.

\_\_\_\_\_  
**NOTARY PUBLIC**

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**DEVELOPMENT AGREEMENT**

**Between**

**CITY OF AMES, IOWA**

**And**

**PRAIRIE FIRE DEVELOPMENT GROUP, LLC**

**BUILDERS DEVELOPMENT CORPORATION, LLC**

**December 22, 2020**

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## **DEVELOPMENT AGREEMENT**

THIS DEVELOPMENT AGREEMENT (this "**Agreement**") is entered into effective as of the \_\_\_\_ day of \_\_\_\_\_, 2020 ("**Effective Date**") by **CITY OF AMES, IOWA** (the "**City**"), a municipal corporation duly organized under the laws of the State of Iowa, and **PRAIRIE FIRE DEVELOPMENT GROUP, LLC ("PFDG")**, a Kansas limited liability company and **BUILDERS DEVELOPMENT CORPORATION ("BDC")**, a Missouri corporation (each, a "**Party**" and together, the City and the Developer are referred to as the "**Parties**").

### **RECITALS**

A. The City is a municipal corporation duly organized under the laws of the State of Iowa.

B. The Developer is a joint venture between PFDG and BDC, with the mailing address of 770 E. 5<sup>th</sup> Street, Kansas City, Missouri 64106, and are both authorized to do business in the State of Iowa.

C. The City is the owner of certain real property (the "**Property**") legally described as Lot 27, Baker Subdivision, Ames, Iowa, and desires to have the Property developed with affordable housing as described in its Request For Proposals (RFP) dated August 3, 2020.

D. The Developer's Proposal, itself or by and through an Affiliate, was selected by the City of Ames, Iowa, in response to the RFP to apply for a 9% Low Income Housing Tax Credit application with the Iowa Housing Finance Agency ("**IFA**") on October 27, 2020.

E. Developer intends to apply for a 9% low income housing tax credit allocation from the Iowa Housing Finance Agency ("**IFA**") to implement development of the Property (the "**Tax Credit Transaction**")

F. The City has agreed to sell the Property to Developer for \$2,500, contingent upon approval of a 9% tax credit allocation from IFA and will outline the details of this in an option agreement prior to application submittal. The terms of said option agreement (the "Option Agreement") are subject to approval by the City Council.

G. The City is the owner of certain real property (the "**Property**") legally described in the attached Exhibit A which Developer is desirous of acquiring and developing in accordance with the terms of this Agreement. The City and the Developer acknowledge that the City purchased the property using Community Development Block Grant (CDBG) funds appropriated by the federal government.

## **AGREEMENT**

**NOW, THEREFORE**, in consideration of the premises and the mutual covenants and agreements contained in this Agreement and other good and valuable mutual consideration, the receipt and sufficiency of which are acknowledged, the Parties agree as follows:

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

Section 1.01 Definitions. In addition to those capitalized terms defined elsewhere in this Agreement, the following terms shall have the following meanings as used in this Agreement:

**“Affordable”** means housing for rent to persons with an income below sixty percent (60%) of the area median income in accordance with the Low-Income Housing Tax Credit program requirements and approved mix of low and very low-income units for the Project. Area median income will be based on current income guidelines published annually by the Department of Housing and Urban Development.

**“Affordable Housing Requirement”** means a minimum of 31 of 36 housing units, or as otherwise agreed upon by the City, will be affordable and available for rent, pursuant to this agreement. The Affordable Housing Requirement is in furtherance of the City’s objective to provide Affordable housing and promote a diverse neighborhood as an integral part of the Project.

**"Agreement"** means this Development Agreement, entered by the City and the Developer.

**"Applicable Laws"** means all then applicable statutes, laws, rules, regulations, ordinances, decrees, writs, judgments, orders and administrative and judicial opinions enacted, promulgated and/or issued by any federal, state, county, municipal or local governmental, quasi-governmental, administrative or judicial authority, body, agency, bureau, department or tribunal.

**"City"** means the City of Ames, Iowa, a municipal corporation duly organized under the laws of the State of Iowa, and its successors and assigns and any surviving, resulting or transferee entity.

**“City Code”** means the zoning and building codes and ordinances of the City applicable to the Project.

**"City Council"** means the City Council of the City.

**“Concept Plan”** means the preliminary development concept plan, inclusive of site design and housing affordability requirements, to be submitted for approval by Staff and City Council prior to submittal to IFA as part of the LIHTC application due in March 2021. The Concept Plan is to be based upon the initial RFP submittal approved by the City Council.

**"Cure Period"** means a period of sixty (60) days after written notice is given by a non-defaulting party to the defaulting party of an Event of Default, as defined in Article IX of this Agreement, during which time the defaulting party may cure any such Event of Default provided such defaulting party is pursuing such cure in good faith and with due diligence.

**"Development Team"** means the Developer, personnel from Developer's members and qualified third-party consultants selected in accordance with this Agreement with expertise in the design, architecture, engineering, and development of affordable housing projects that are of the same or higher caliber of the Project envisioned by the City and as may be needed from time to time for the Developer to meet its obligations under this Agreement.

**"Force Majeure Conditions"** means a condition by reason of which the construction of the Project Improvements or completion of all or any of the Project is delayed, prevented or materially impeded through no fault of the Developer, due to acts of God, prohibitive or seasonal weather conditions, strikes, lockouts, labor troubles, inability to procure materials, failure of power, extreme and extraordinary governmental delay, riots or other events or circumstances beyond such Party's control; provided, however that the Developer has given written notice to the City of the existence of the condition reasonably promptly after first becoming aware of the condition.

**"Hazardous Substances"** means dangerous, toxic or hazardous pollutants, contaminants, chemicals, waste, materials or substances as defined by federal, state or local law, regulation or ruling and also any urea formaldehyde, polychlorinated biphenyls, asbestos, asbestos-containing materials, nuclear fuel or waste, radioactive materials, explosives, carcinogens and petroleum products, or any other waste, material, substance, pollutant, or contaminant which would subject the owner or mortgagee or any holder to any damages, penalties or liabilities under any applicable federal, state or local law, regulation or ruling.

**"HOME"** means the HOME Investment Partnerships Program (HOME), a type of federal assistance provided by the U.S. Department of Housing and Urban Development (HUD) to provide affordable housing, particularly housing for low- and very low-income Americans. The City of Ames is a recipient of HOME Funds.

**"Infrastructure"** means the surface and subsurface improvements constructed and installed within, upon and beneath the Property to service the Project Improvements.

**"Iowa Housing Finance Agency"** or **"IFA"** means the State Housing Agency that administers the Low-Income Housing Tax Credit (LIHTC) program for the State of Iowa.

**"Low-Income Housing Tax Credits"** or **LIHTC** means those low-income housing tax credits approved and issued by IFA as allocated annually to the State by the Internal Revenue Service of the United States of America.

**"Pre-Construction Activities"** mean the activities of the Developer set forth in Article V hereof.

"**Project**" means the development of up to fifty (50) units of affordable, mixed income rental housing, to be completed in accordance with this Agreement and the Concept Plan.

"**Project Completion Date**" means the date on which the Developer completes the entire Project in accordance with this Agreement and the Concept Plan.

"**Project Improvements**" means the improvements to be constructed by the Developer on the Property in accordance with this Agreement and the Concept Plan.

"**Developer**" means the to be formed development entity, comprised of Prairie Fire Development Group, LLC, a Kansas limited liability company, Builders Development Corporation, and its successors and assigns.

"**State**" means the State of Iowa.

"**Transaction Document**" or "**Transaction Documents**" means this Agreement, the Option Agreement, and any other document related to the Project.

Section 1.02 Other Terms. Words and phrases that are not capitalized shall be given their plain and ordinary meaning.

Section 1.03 Headings. The headings and captions of this Agreement are for convenience and reference only, and in no way define, limit or describe the scope or intent of this Agreement or any provision of this Agreement.

Section 1.04 Accounting Terms. Accounting terms used in this Agreement and not otherwise specifically defined shall have the meaning ascribed such terms by generally accepted accounting principles as from time to time in effect.

Section 1.05 Rules of Construction. Words of the masculine gender shall be deemed and construed to include correlative words of the feminine and neuter genders. Unless the context shall otherwise indicate, the words importing the singular shall include the plural and vice versa, and words importing person shall include entities, associations and corporations, including public bodies, as well as natural persons.

Section 1.06 Conflicting Provisions. In the event of any conflict between the terms of this Agreement and the Concept Plan, the terms of this Agreement shall prevail.

## **ARTICLE II REPRESENTATION, WARRANTIES AND COVENANTS**

Section 2.01 Representations, Warranties and Covenants of the Developer. The Developer represents, warrants and covenants that:



(a) The Developer consists of a Missouri corporation and a Kansas limited liability company, duly created and existing, and in good standing under the laws of the States of Kansas, Missouri and Iowa and is authorized to do business in the State.

(b) The Developer has full power and authority to enter into this Agreement and to carry out its obligations under this Agreement, and, by proper actions of its members has been duly authorized to execute and deliver this Agreement.

(c) This Agreement will be the valid and binding obligation of Developer, enforceable against the Developer in accordance with its terms.

(d) Neither the execution and delivery of this Agreement, nor the fulfillment of or compliance with the terms and conditions of this Agreement, nor the consummation of the transactions contemplated by this Agreement, conflicts with or results in a breach of the terms, conditions or provisions of any restriction or any agreement or instrument to which the Developer is now a party or by which the Developer is bound.

(e) There is no litigation or other proceedings pending or threatened against the Developer or any other person affecting the right of the Developer to execute or deliver this Agreement or the ability of the Developer to comply with its obligations under this Agreement.

(f) The Developer represents, warrants and covenants that Developer has the financial capacity to finance, develop and operate the Project.

(g) Prairie Fire Development Group, LLC, Builders Development Corporation, and the Developer entity agree to work exclusively with the City of Ames on the March 2021 LIHTC application round and will not submit any other LIHTC applications to IFA in this round.

(h) Developer, and Developer's agents, contractors, officers, successors and assigns and shall comply with all federal laws affecting the Property and its development, including the wage requirements of the Davis Bacon Act.

Section 2.02 Representations, Warranties and Covenants of the City. The City represents, warrants and covenants that:

(a) The City is a municipal corporation duly organized under the laws of the State and has power to enter into this Agreement. The City Council has duly authorized the negotiation and delivery of this Agreement. This Agreement is subject to approval by the City Council.

(b) No councilperson of the City Council or any other officer of the City taking any official action with regard to this Agreement or the Project has any conflicting interest (financial, employment or otherwise) in the Developer, the Project or the transactions contemplated by this Agreement.

Section 2.03 Survival of Representations, Warranties and Covenants. All representations, covenants and warranties of the Developer and the City contained in this Agreement, in any certificate or other instrument delivered by the Developer or the City pursuant to this Agreement, or otherwise made in conjunction with the project transactions contemplated by this Agreement shall survive the execution and delivery of this Agreement.

### **ARTICLE III RESTRICTIONS ON USE**

#### **Section 3.01 Use Restrictions.**

(a) Developer and its successors and assigns and every successor in interest to all or any part of the Property shall, upon acceptance of title thereto:

(i) Devote all uses of the Property in accordance with and subject to the provisions of the approved Concept Plan.

(ii) Not discriminate on the basis of race, color, religion, sexual orientation, family status, handicap, sex or natural origin in the sale, lease or rental or in the use or occupancy of all or any part of the Property;

(iii) Maintain the use of the property for Affordable Housing in accordance with the Concept Plan for a minimum of 30 years regardless of continued participation in the LIHTC program.

(iv) Comply with all Terms and Conditions published as Part B of the 2020-21 Qualified Application Plan adopted by IFA.

(v) Comply with all Threshold Requirements published as Part C of the 2020-21 Qualified Application Plan adopted by IFA.

(vi) Rent each apartment dwelling with a single lease for the whole of an apartment and the apartment shall not be leased by multiple individual leases or by individual lease per bedroom

(b) It is intended and agreed that the covenants provided in this Section shall be set forth in a separate covenant and restriction to be filed of record running with the land binding to the fullest extent permitted by law and equity for the benefit and in favor of and enforceable by: the City, its successors and assigns, the City, any successor in interest in the Property or any part of the Property, the owner of any other real estate or of any interest in real estate that is subject to the real estate use requirements and restrictions required hereunder, the United States, against the Developer, its successors and assigns, and every successor in interest to the Property, or any part thereof or any interest therein, and any party in possession or occupancy of the Property or any part thereof.

(c) The covenant in subsection (a) of this Section shall remain in effect for in perpetuity.

#### **ARTICLE IV**

#### **CONDITIONS PRECEDENT TO DEVELOPER'S PERFORMANCE**

4.01 City's Obligations. As a condition precedent to

(a) The obligations of the City to convey the Property to the Developer, the Developer shall provide to the City at least thirty (30) days prior to delivery of a Title Transfer Notice copies of the following documents satisfactory to the City, each to be reviewed and approved by the City in its sole and absolute discretion (the "**Component Financing Documents**");

(i) Financial statements demonstrating Developer has the debt and equity adequate to complete the Project;

(ii) A guaranteed maximum price construction contract for the Project ("**GMP**");

(iii) Construction loan documents that are ready to close and immediately fund the Project, which together with Developer equity and all other sources of financing, meet or exceed, in the aggregate, the GMP and the cost of furnishing and equipping the Project;

(iv) A payment and performance bond or letter of credit to guarantee construction work, satisfactory to the lender and investor;

(v) Liability, casualty, workers compensation, and other insurance in types and amounts obtained on similar projects in the Ames metropolitan area;

(vi) The identity of the members, partners, officers and principal executives or other key personnel or investors of Developer and any transfers of interests among such parties;

(vii) Such other financial due diligence as requested by the City and the City shall have the right to have its outside financial consultant confidentially conduct full financial due diligence relating to Developer and the Component Financing Documents; provided such outside financial consultant executes a confidentiality agreement in form and substance reasonably acceptable to Developer;

(viii) Complete sources and uses allocation for the Project;

(ix) Detailed construction and development schedule for the Project;

- (x) Proposed guarantor, if any, of completion of the Project;
- (xi) Evidence of IFA's allocation of the Low-Income Housing Tax Credits to the Project in the 2021 award cycle; and
- (xii) All documents or materials required from the Developer under Article V;
- (xiii) Evidence that Developer has complied with all of the representations, warranties and covenants made in Article II, Section 2.01 herein.

Completion of the foregoing to the City's satisfaction must occur no later than fifteen (15) days prior to the delivery of the Title Transfer Notice (the "**Diligence Approval Date**").

(b) The Developer's performance of the terms and requirements of this Agreement, as to the construction of Project Improvements pursuant to Article VIII below for all of the Project, shall at all times be subject to conveyance of the Property to Developer by the City in accordance with its obligations as set forth in the Option Agreement (collectively, the "**City Obligations**").

## **ARTICLE V PRE-CONSTRUCTION ACTIVITIES**

5.01 Developer's Obligations. Subject to the City's material satisfaction of its City Obligations and prior to the Developer's obligation to commence construction of the Project Improvements, the Developer shall complete the following activities for the Project (collectively, the "**Pre-Construction Activities**"):

(a) Developer, at the Developer's cost and expense, shall prepare a complete a 9% Low Income Housing Tax Credit application that meets the threshold requirements of the Qualified Allocation Plan and submit it timely for consideration by IFA on or before the application due date set by IFA, which is currently set as March 10, 2021, by 4:30 P.M. The Application shall include the design and preliminary scoring elements identified as part of the RFP submittal on September 11, 2020 and accepted by the City Council on October 27, 2020, by City Council Resolution #20-570, subject to changes approved by the City.

(i) The Developer shall work with City staff to prepare an updated Concept design to address building locations, architectural character, and potentially to add units. The updated Concept Plan is subject of City Council acceptance prior to March 1, 2021. Developer's failure to obtain City Council approval prior to March 1, 2021, shall constitute default of Developer's obligations under this Agreement and shall result in the full cancellation of the City's obligations under this Agreement and the full cancellation of the Option Agreement.

(b) The Developer or its consultants shall prepare designs for infrastructure for the Project, if and when required by City Code for development of the Project, which infrastructure shall include, but not be limited to, high speed internet, geothermal connections, open space design, conduits, sanitary and storm sewer lines, storm drainage and other utilities, streetscape, landscape and lighting improvements for the Property (collectively, "**Infrastructure**"), all of which Infrastructure shall be consistent with the studies prepared pursuant to the Concept Plan.

(c) Upon IFA's award of LIHTC to the Developer for the Project, and prior to the City conveying the property to the developer, a final Development Plan shall be prepared by the Developer at their cost for review and approval by the City Council. The Development Plan shall provide a complete description of the Project, including generally, such things as are required to secure all permits from the City for the Property that is the subject of the Development Plan, such as: (i) building uses; (ii) gross building area; (iii) gross leasable area; (iv) parking requirements based on local zoning regulations; (vi) infrastructure improvements for the Project; (vii) the estimated time-frame in which the Project shall be implemented; (viii) the number of Affordable housing units to be included in the Project; and (ix) proposed Infrastructure. Notwithstanding the foregoing, any future amendment to the approved Development Plan shall be subject to the review and approval of the City in accordance with applicable laws and ordinance.

(d) The Developer, at the Developer's sole cost and expense, will prepare an application for rezoning the Property to rezone the Property to an acceptable zoning designation, all in accordance with applicable City ordinances.

5.02 Planning Approvals. Notwithstanding anything herein to the contrary, the City shall review and apply all planning, zoning, building, stormwater, utility, and platting requirements under applicable City policies and ordinances and the Code of Iowa, and the Developer shall develop and construct the Project in a manner consistent with said requirements and Approvals.

## **ARTICLE VI CONSTRUCTION OF INFRASTRUCTURE**

Section 6.01 Construction of Infrastructure. Following satisfaction and approval of each of the requirements of Article V above, as to the Project and prior to the construction of the Project Improvements proposed for the Project, inclusive of all Infrastructure to be made within the Property, the Developer or its consultants shall construct and install such Infrastructure, materially in accordance with the approved Development Plan, which has been designed, approved and as may be modified pursuant to Section 5.01 above. Any such Infrastructure shall be constructed and installed by the Developer or its consultants at Developer's cost and expense.

## **ARTICLE VII PROPERTY TRANSFER**

Section 7.01 Exercise of Option. The Parties acknowledge that the City owns the Property. Following: (i) the Parties' mutual and complete performance of the Conditions Precedent identified in Article IV and the Pre-Construction Activities identified in Article V; and

(ii) the Developer providing written notice to the City of its election to exercise its option to purchase the Property under the Option Agreement subject to the terms and conditions of this Agreement and the Option Agreement and the requirements of Iowa Code Chapter 364.7, which notice shall include documentation of the Developer's private financing commitments to the City for inspection (the "**Title Transfer Notice**") the City shall close the sale of the Property in accordance with the Option Agreement. The purchase price to be paid by the Developer or its assignee or designee to the City, as applicable, for the Property identified within the Title Transfer Notice ("**Sale Price**") shall be Two Thousand Five Hundred Dollars (\$2,500.00).

## **ARTICLE VIII DEVELOPMENT PLAN & CONSTRUCTION OF PROJECT IMPROVEMENTS**

### **Section 8.01 Development of the Project.**

(a) Following Developer's acquisition of the Property from City, Developer shall perform the following undertakings in accordance with the process ("**Process**") set forth below:

(i) Developer shall exercise commercially reasonable efforts to obtain all Governmental Approvals for the Project;

(ii) Developer shall prepare and complete marketing materials and begin pre-sale and pre-lease activities;

(iii) Developer shall commence construction of the Project Improvements for the Project in accordance with the GMP and the Development Plan, subject to Force Majeure Conditions;

(iv) Subject to Force Majeure Conditions, Developer shall: (A) commence and complete construction of the Infrastructure within sixty (60) days following the Closing Date (as defined in the Option Agreement); (B) commence construction of the Project Improvements within ninety (90) days following the Closing Date (as defined in the Option Agreement); and substantially complete construction of the Project Improvements in the Project on or before the second (2<sup>nd</sup>) anniversary of the Closing Date (as defined in the Option Agreement);

(b) The Developer agrees that it will enter into the necessary contracts with contractors for the Project Improvements and cause those contracts to provide that all work performed under such contracts be in accordance with the Development Plan and this Agreement.

(c) Commencing upon the date construction of the Project Improvements begins and thereafter, on a bi-annual basis prior to the Project Completion Date, the Developer shall prepare and deliver to the City a written update regarding the status of the Process for the Project which is then subject to the Process by Developer at the time of delivering the status update. In the event the City identifies that an act or omission on the part of the Developer in the performance of the Project may result in the City withholding the Certificate of Occupancy pursuant to Section 8.05 below, the City agrees to and shall timely provide the Developer with a written statement

indicating, in reasonable detail, such act or omission and the measures or acts necessary, in the reasonable opinion of the City, for the Developer to take or perform in order to perform in such a manner to timely obtain a Certificate of Occupancy pursuant to Section 8.05 below. The Parties shall meet on an as-needed basis to discuss the Project status report.

#### 8.02 Assignment of Development Rights.

(a) Developer shall not be permitted to assign this Agreement, the Option Agreement, or any development rights in the Project except as expressly permitted herein or except as expressly consented to by the City in writing.

(b) By execution hereof, the City hereby consents to: (i) the assignment of this Agreement and the rights and obligations hereunder, in whole, from the Developer to the Developer's wholly owned subsidiary which will be a "To Be Formed" Limited Partnership entity required for the IFA Application (the "**Developer's Subsidiary**"); and (ii) Developer's Subsidiary's concurrent, limited assignment of the rights and obligations of this Agreement, as to all of the Project, to Developer's lender. The assignment by the Developer to Developer's Subsidiary shall be effective upon the Effective Date of the Assignment and Assumption Contract (the "**Assignment Effective Date**"). The assignment by the Developer to Developer's Subsidiary shall require: (i) Developer's Subsidiary assume, in whole and without exception, all of obligations of the Developer under this Agreement, from and after the Assignment Effective Date; and (ii) the City to acknowledge, in writing, the Assignment Effective Date, which acknowledgment shall not be unreasonably withheld, conditioned or delayed.

Section 8.03 Development Plan; Modifications. The Developer shall diligently pursue completion of the Project in conformance with the Development Plan and this Agreement. Should the Developer deem it necessary or desirable to amend the Development Plan, the Developer shall submit such proposed modifications to the City, including plans and specifications for Project Improvements and a revised Project Completion Date, if applicable. The City shall timely review such modification within a reasonable time and shall send written notice of the City's approval or rejection of the modifications to the Developer. If the City rejects any such modification, the notice so stating shall set forth the reasons for rejection. Following receipt of such notice, the Developer and City shall follow the process set forth in Section 8.05 below as to future submittals by the Developer of the modifications.

Section 8.04 Extensions Due to Force Majeure Conditions. The Project Completion Date may be extended due to any Force Majeure Condition if the Developer notifies the City of the existence of such condition reasonably promptly after first becoming aware of such condition. The extension of time for the Project Completion Date shall be for the period of any delay or delays caused or resulting from any Force Majeure Condition; provided, however, the Developer must notify the City of the existence of such Force Majeure Condition within forty five (45) days after the Developer becomes aware of the commencement of a Force Majeure Condition, which notice to the City shall include documentation or other information reasonably necessary to establish the existence of the Force Majeure Condition and an estimate of the approximate period of delay to be created by the Force Majeure Condition. The Developer's failure to provide such

notice and documentation shall eliminate the waiver of default due to such Force Majeure Condition created in this Section.

Section 8.05 Project Certificate of Occupancy. Upon the completion of the construction of the Project Improvements and the Project in accordance with the Development Plan, the Developer shall send a written request to the City for a Certificate of Occupancy issued by the City. The Certificate of Occupancy shall be a conclusive determination of the Developer's satisfaction and termination of the Project Covenants in this Agreement regarding completion of the Project in accordance with the Development Plan and this Agreement. The Certificate of Occupancy shall not be unreasonably withheld, conditioned or delayed. If the City fails or refuses to provide the Certificate of Occupancy after receiving a written notice requesting such certificate, the City shall, within fifteen (15) days of receiving such request, provide the Developer with a written statement indicating in reasonable detail how the Developer has failed to complete the Project in conformity with the Development Plan, this Agreement, or the Ames Municipal Code or state law, and the measures or acts necessary, in the opinion of the City, for the Developer to take or perform in order to obtain a Certificate of Occupancy. Thereafter, the Developer shall exercise reasonable means to cure the Developer's failure to complete and, upon completion of such activities, shall submit a request for a Certificate of Occupancy to the City which shall be processed in accordance with this Section

Section 8.06 Maintenance. The Developer shall, at all times during the term and while in ownership thereof, maintain the Project Improvements and Property in a good state of repair and attractive appearance.

Section 8.07 Payment of Fees, Costs and Expenses. Except as otherwise provided herein, the Developer shall pay to the City all reasonable fees owed to the City and all necessary and reasonable expenses and costs incurred by the City in performance of its obligations under this Agreement, including reasonable attorney's fees.

Section 8.08 HOME Funds. The City agrees to reserve for Developer a minimum of \$250,000 in HOME funds to Developer, subject to final design approval and a mutually agreed payment schedule for Construction of improvements.

## **ARTICLE IX DEFAULT AND TERMINATION; ESTOPPEL**

Section 9.01 Events of Default Defined. The following shall be "**Events of Default**" under this Agreement and the terms "Events of Default" and "Default" shall mean, whenever they are used in this Agreement, any one or more of the following events:

- (a) Failure by the Developer to observe and perform any covenant, term condition or agreement on its part to be observed or performed under this Agreement, which failure continues uncured following the Cure Period.
- (b) The filing by the Developer of a voluntary petition in bankruptcy, or failure by the Developer to promptly lift any execution, garnishment or attachment of such



consequence as would impair the ability of the Developer to carry on its operation, or adjudication of the Developer as a bankrupt, or assignment by the Developer for the benefit of creditors, or the entry by the Developer into an agreement of composition with creditors, or the approval by a court of competent jurisdiction of a petition applicable to the Developer in any proceedings whether voluntary or involuntary instituted under the provisions of the federal bankruptcy laws, as amended, or under any similar acts which may hereafter be enacted.

(c) The occurrence of an Event of Default.

(d) The Developer's breach of the Project Covenant defined in Section 10.01 below.

(e) The failure of the Developer through the fault of the Developer to complete the Project Improvements for by the Project Completion Date in accordance with the provisions of Article VIII and subject to any extensions by the period of time equal to the delays caused by any Force Majeure Conditions.

(f) Failure by the City to observe and perform any covenant, term, condition or agreement on its part to be observed or performed under this Agreement, which failure continues uncured following the Cure Period, provided that the City shall not be in default for any such failure if the City is unable to obtain funding for any City funding obligation under this Agreement due to the lack of available City funds.

#### Section 9.02 Remedies on Default.

(a) Whenever any Event of Default shall have occurred and be continuing, the non-defaulting party shall have the right, at its option and without any further demand or notice, to take whatever action at law or in equity may appear necessary or desirable to enforce performance and observance of any obligation, agreement or covenant of the Developer or the City, as applicable, under this Agreement, including, but not limited to, terminating this Agreement on any portion of the Property then owned by the Developer, or instituting such proceedings as may be necessary or desirable, in the non-defaulting party's sole opinion, to compensate the non-defaulting party for any damages resulting from all breaches by the defaulting party, including, but not limited to, a proceeding for breach of contract and/or damages.

(b) Notwithstanding anything to the contrary set forth in this Agreement, the City shall, in no way, be limited to the terms of this Agreement in enforcing, implementing and/or otherwise causing performance of the provisions of this Agreement and/or the Development Plan or pursuant to applicable City ordinances or in exercising its right and authority to condemn the Property after the Developer's Default and failure to cure during the Cure Period as provided in this Agreement.

(c) Before enforcing any remedies against the Developer due to the occurrence of an Event of Default on the part of the Developer, the City shall provide notice and an opportunity to cure such Event of Default to each holder of any deed of trust affecting the Property which is filed

of public record as of the date which is twenty (20) days prior to the issuance of such action by the City. Such notice shall provide a fifteen (15) day holder cure period for a monetary Event of Default, and a sixty (60) day holder cure period for a non-monetary default.

Section 9.03 No Waiver. No delay or omission of a party to exercise any right or remedy occurring upon an Event of Default shall impair any such right or remedy or constitute a waiver of any such Event of Default or acquiescence to such Event of Default. Every right and remedy given by this Article or by law may be exercised from time to time and as often as may be deemed expedient by the City. No waiver of any breach of any covenant or agreement contained in this Agreement shall operate as a waiver of any subsequent breach of the same covenant or agreement or as a waiver of any breach of any other covenant or agreement. In case of a breach, the non-defaulting Party may nevertheless accept from the defaulting Party any payment or payments made under this Agreement without in any way waiving right of the non-defaulting Party to exercise any of its rights and remedies provided for in this Agreement with respect to any such default or defaults of the defaulting Party which were in existence at the time such payment or payments were accepted by the non-defaulting Party.

Section 9.04 Rights and Remedies Cumulative. The rights and remedies set forth herein and provided by law shall be construed as cumulative and continuing rights and may be exercised concurrently or alternatively. No one of them shall be exhausted by the exercise of such option on one or more occasions.

Section 9.05 Term. Notwithstanding anything to the contrary, this Agreement and the and the obligations hereunder and the Option Agreement shall terminate fully, and neither Party shall have any obligation to the other whatsoever, if the Project does not receive Low-Income Housing Tax Credits from IFA in the 2021 award cycle.

## **ARTICLE X SPECIAL COVENANT AND DAMAGES FOR BREACH**

Section 10.01 Project Covenant. It is acknowledged that the City's willingness to enter into this Agreement and carry out the City's obligations under the Transaction Documents is based on the anticipated benefits to be derived in the City through the Developer's completion of the Project and the proper maintenance of the Project and/or any Project. The Developer covenants and agrees that it will at all times: (a) timely commence the Project in accordance with Section 8.01, subject to a Force Majeure Condition, as provided in Section 8.04; (b) properly complete the Project, following commencement of the Project; and (c) properly operate and maintain the Project and the Project Improvements and/or the Parking Structure as Public Parking during the period in which such Project and Project Improvements and the Parking Structure are owned by the Developer or its assignee or designee (collectively, items (a)-(c) are hereinafter the "**Project Covenant**").

Section 10.02 Remedy Upon Breach of Project Covenant. If the Developer does not, in the City's reasonable discretion, comply with the Project Covenant then the Developer shall be in breach and violation of the Project Covenant. The Parties acknowledge that the damages that will be incurred upon any material breach or violation of the Project Covenant would be impossible

to ascertain with any reasonable degree of certainty. Nevertheless, the Parties have attempted to fairly approximate the amount of such damages, and have agreed that upon any material breach or violation of Project Covenant 10.01(a) or (b) above, the City may, but shall not be obligated to, exercise its right to enforce (but not as a penalty) one of the following remedies (individually, **“Project Covenant Liquidated Damages”**):

(a) if the subject Property has been improved only with Infrastructure and no Project Improvements, then the City may terminate this Agreement and/or, immediately upon demand and following any applicable Cure Period, the Developer shall convey the Property and any and all improvements thereon, including the Project Improvements (collectively, **“Project Property”**) then owned by the Developer or its assignee or designee to the City by a special warranty deed in a form reasonably acceptable to the Parties. Such conveyance shall be made by the Developer to the City upon the City’s payment to the Developer of the sum of Ten and 00/100 Dollars (\$10.00). Partial termination of this Agreement and/or reconveyance of the Property shall constitute Project Covenant Liquidated Damages and be the City's sole remedy for a material breach or violation of the Project Covenant.

(b) if the Property has been improved with Infrastructure and certain Project Improvements that are insufficient for issuance of Certificate of Occupancy, then the City may terminate this Agreement and/or, immediately upon demand and following any applicable Cure Period, the Developer shall convey any and all of the Property then owned by the Developer or its assignee or designee to the City by a special warranty deed in a form acceptable to the Parties. Such conveyance shall be made by the Developer to the City subject to the payment by the City to the Developer or its designee or assignee of the Sale Price for such Project Property less an amount needed to release all obligations, outstanding financings or mechanic’s liens that could or do encumber title to the Project Property. Partial termination of this Agreement and/or reconveyance of such Project Property shall constitute Project Covenant Liquidated Damages and be the City's sole remedy for a material breach or violation of the Project Covenant.

(c) In the event of a default of the restrictions set forth in Section 3.01(a) and/or Section 10.01 of this Agreement by Developer or any Successor Owner (defined below) in interest or title to Developer in the Project, Project Improvements, and/or the Property (each, an **“Owner”**) or any party claiming an interest in the Project or the Property through, by, or under an Owner (such parties and the Owners, collectively, **“Violators”** and each, a **“Violator”**), such Owner and/or Violators shall have ten (10) days in which to cure such default after receipt of notice of said default from the City. In the event that the defaulting Owner or Violator cannot cure a default in a timely manner, then the City shall have the right to either: 1) take such action to cure such default as City deems necessary in its sole discretion and to assess such then Owner(s) for the costs thereof as a lien against the Project Improvements and the Property in order to collect same; or 2) get an injunction from an applicable court of law to force specific performance to cure such default by the then Owner(s) of the Project Improvements and the Property, the amount of the bond for same being One Hundred and 00/100 Dollars (\$100.00) and no more; or 3) to pursue such other remedies available at law or in equity as may be available to the City with respect to the Project Improvements, the Property, and then Owner(s) of the Project Improvements and the Property.

Section 10.03 Successor Owners. At such time as Developer conveys any Property or Project Improvement to another party, whether by sale or assignment (each such party being a "**Successor Owner**"), Developer shall include in the conveyance instrument for such Project Property or Project Improvement a requirement that such Successor Owner shall be subject to (i) the Use Restrictions set forth in Article III above, and (ii) the Project Covenant (together, (i) and (ii) are hereinafter referred to as "**Successor Covenants**") and, in the event such Successor Owner materially breaches or violates such Successor Covenants, notice of which shall be provided by the City to the Successor Owner, the Successor Owner shall be subject to the Project Liquidated Damages as set forth above.

## **ARTICLE XI RISK OF LOSS AND INSURANCE**

Section 11.01 Allocation of Risk. All risk of loss with respect to such portion of the Property and the Project Improvements owned by Developer shall be borne by the Developer, and all risk of loss with respect to such portion of the Property owned by the City shall be borne by the City.

Section 11.02 Insurance. The Developer shall, at its expense, maintain or cause to be maintained a policy of all risk casualty insurance insuring the Property and the Project Improvements owned by the Developer. Such policy of insurance shall also name the City and such other persons designated by the City as additional insureds and shall each contain a provision that such insurance may not be canceled without at least thirty (30) days' advance written notice to the City. The City's rights as an additional insured shall be subordinate to the prior rights of each holder of any deed of trust affecting any portion of the Property. Copies of such insurance policies shall be furnished to the City together with certificates of such policy bearing notations evidencing payment of premiums or other evidence of such payment. Such policy shall include a waiver of subrogation consistent with the release described in Section 11.04 below.

Section 11.03 Blanket Insurance Policies. The Developer may satisfy any of the insurance requirements set forth in this Article by using blanket policies of insurance, provided each and all of the requirements and specifications of this Article respecting insurance are complied with.

Section 11.04 Mutual Release. Anything in this Agreement to the contrary notwithstanding, it is agreed that each Party hereby releases the other from any claim, demand or cause of action arising out of any loss or damage to all or any portion of the Property or Project Improvements constructed thereon caused by a peril insurable pursuant to an all risk casualty insurance policy in standard form available in the State.

## **ARTICLE XII COMPLIANCE WITH APPLICABLE LAWS**

The Parties hereto shall, at their respective sole cost and expense, comply with all Applicable Laws and shall pay all costs, expenses, claims, fines, penalties and damages that may in any manner arise out of, or be imposed as a result of, the failure of such Party to comply with the provisions of this Article. Notwithstanding any provision contained in this Article, however,

either Party shall have the right, at its sole cost and expense, to contest or review, by legal or other appropriate procedures, the validity or legality of any such Applicable Laws, or any such requirement, rule or regulation of an insurer, and during such contest or review the contesting Party may refrain from complying therewith to the extent such noncompliance is expressly permitted by law and provided that such noncompliance does not result in adverse action being taken against the Project, the Property, the City or the City.

### **ARTICLE XIII LIENS**

13.01 Release by Developer. The Developer shall not do or suffer anything to be done by any person or entity whereby all or any part of any portion of the Property may be encumbered by any mechanics' or other similar lien. Whenever and as often as any mechanics' or other similar lien is filed against all or any portion of the Property purporting to be for or on account of any labor done or materials or services furnished to Developer in connection with any work in or about any portion of the Property, the Developer shall discharge the same of record within thirty (30) days after the date of filing. If the Developer fails to do so, then the City may, if the City is then in ownership of such Property, but shall not be obligated to, take such action and pay such amounts on account of the Developer as may be necessary in order to cause such lien to be discharged of record. The Developer shall have no obligation to discharge any lien purporting to be for or on account of any labor done or materials or services furnished to the City, the City or any other party in connection with any work in or about any portion of the Property.

13.02 Release by City. The City shall not do or suffer anything to be done by any person or entity whereby all or any part of any portion of the Property may be encumbered by any mechanics' or other similar lien. Whenever and as often as any mechanics' or other similar lien is filed against all or any portion of the Property purporting to be for or on account of any labor done or materials or services furnished to City in connection with any work in or about any portion of the Property, the City shall discharge the same of record within thirty (30) days after the date of filing. If the City fails to do so, then the Developer may, but shall not be obligated to, take such action and pay such amounts on account of the City as may be necessary in order to cause such lien to be discharged of record.

### **ARTICLE XIV INDEMNIFICATION**

Section 14.01 Indemnity. The Developer agrees to protect, defend, indemnify and hold harmless the City and the City's council members, officers, directors, employees, agents, affiliates, successors and assigns, at Developer's cost and using legal counsel selected by the Developer, from and against all claims, demands, losses, damages, costs, expenses, liabilities, taxes, assessments, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, causes of action, remedial action requirements and/or enforcement actions of any kind (including, without limitation, reasonable attorney's fees and court or similar costs) directly arising out of or attributable to in whole or in part:

- (a) the material inaccuracy of any representation or the material breach of any representation, covenant or warranty of the Developer contained in this Agreement;
- (b) the Developer's negligent or intentional misuse of any portion of the Property;
- (c) the failure on the part of the Developer to materially perform, observe and/or comply with any covenant, obligation or duty to be performed, observed and/or complied with by the Developer pursuant to the terms of this Agreement or any Transaction Document, following the applicable notice and cure provisions and subject to the City's performance of its obligations under this Agreement or any Transaction Document, but only to the extent that the City's performance of its obligations is a prerequisite for the Developer's performance of its obligations;
- (d) any condition of or damage to all or any portion of the Property which is caused by any negligent act or omission of the Developer or the Developer's agents, contractors, subcontractors, servants, employees, members, officers, directors, licensees or invitees or any other person or entity for whose acts or omissions the Developer is otherwise responsible pursuant to Applicable Law;
- (e) the negligent performance or non-performance by the Developer of any of the terms and conditions of any Transaction Document, contract, agreement, obligation or undertaking entered into by the Developer (whether as the agent of the City or otherwise) in connection with all or any part of the Project; and/or
- (f) any negligent act or omission of the Developer or any of the Developer's agents, contractors, subcontractors, servants, employees, members, officers, directors, licensees or invitees or any other person or entity for whose negligent acts or omissions the Developer is otherwise responsible pursuant to Applicable Law.

#### Section 14.02 Project Environmental.

- (a) The Developer covenants that, while in ownership or possession and control of all or any portion of the Property, it shall not place or cause to be placed, nor permit any other Person to place or cause to be placed, any Hazardous Substances on or about all or any portion of the Property in excess of *de minimis* quantities reasonably necessary to the Developer's use of all or any portion of the Property.
- (b) The Developer agrees to protect, defend, indemnify and hold harmless, the City and the City's council members, officers, directors, employees, agents, affiliates, successors and assigns, from and against any and all claims, demands, losses, damages, costs, expenses, liabilities, assessments, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, causes of action, remedial action requirements and/or enforcement actions of any kind (including, without limitation, reasonable and necessary attorneys' fees and costs) directly or indirectly arising out of or attributable to, in whole or in part: (i) the breach of the covenants of the Developer contained in Section 14.02 (a); (ii) Developer's or Developer's employees', agents', contractors' or

subcontractors' use, handling, generation, manufacture, production, storage, release, threatened release, discharge, treatment, removal, transport, decontamination, cleanup, disposal and/or presence of Hazardous Substances on, under, from or about all or any portion of the Property, provided that such claims, demands, losses, damages, costs, expenses, liabilities, assessments, fines, penalties, charges, administrative and judicial proceedings and orders, judgments, causes of action, remedial action requirements and/or enforcement actions of any kind do not arise out of or related to (x) the negligent acts or omissions of the City or (y) Developer's performance under this Agreement which is prosecuted without negligence or intentional misconduct; or (iii) any other activity carried on or undertaken on all or any portion of the Property by the Developer or any employees, agents, contractors or subcontractors of the Developer in connection with the use, handling, generation, manufacture, production, storage, release, threatened release, discharge, treatment, removal, transport, decontamination, cleanup, disposal and/or presence of any Hazardous Substance at any time located, transported or present on, under, from, to or about all or any portion of the Property, including without limitation: (A) the cost of any required or necessary repair, cleanup or detoxification of any portion of the Property and the preparation and implementation of any closure, remedial or other required plans; and (B) liability for personal injury or property damage arising under any statute or common law tort theory, including damages assessed for the maintenance of a public or private nuisance, response costs or for the carrying on of any abnormally dangerous activity.

(c) The foregoing indemnity obligation includes without limitation: (i) the costs of removal or remedial action incurred by the United States government or the State or response costs incurred by any other person, or damages from injury to, destruction of or loss of natural resources, including the cost of assessing such injury, destruction or loss, incurred pursuant to the Comprehensive Environmental Response, Compensation and Liability Act of 1980 as amended ("**CERCLA**"), 42 U.S.C. §9601 *et seq.*; (ii) the clean-up reasonable and necessary costs, fines, damages or penalties incurred pursuant to any applicable provisions of State law; and (iii) the reasonable and necessary cost and expenses of abatement, correction or cleanup, fines, damages, response costs or penalties which arise from the provisions of any other Applicable Law.

(d) The foregoing indemnity shall further apply to any residual contamination on, under, from or about all or any portion of the Project or affecting any natural resources, arising in connection with the use, handling, generation, manufacturing, production, storage, release, discharge, treatment, removal, transport, decontamination, cleanup, disposal and/or presence of any such Hazardous Substance on, under, from or about all or any portion of the Project and irrespective of whether any of such activities were or will be undertaken in accordance with any Applicable Laws. This indemnity is intended to be operable under 42 U.S.C. Section 9607(e)(1), and any successor section thereof, and shall survive the Closing under this Agreement in all respects.

(e) The foregoing indemnity obligations include within them all costs and expenses (including, without limitation, reasonable and necessary attorneys' fees) incurred in enforcing any right to indemnity contained in this Agreement.

## **ARTICLE XV ASSIGNMENT**

Section 15.01 Successors and Assigns. This Agreement shall be binding upon and shall inure to the benefit of the Developer and its permitted successors and assigns, and any Successor Owner of the Property (provided, however, that this provision shall not be deemed to permit an assignment of this Agreement except as specifically provided in this Article and in Section 8.02 above), and the then "Developer" as used in this Agreement shall be deemed to include such successors and assigns.

Section 15.02 General Assignments. Except as otherwise provided in Section 8.02 above, this Agreement may not be assigned by the Developer without the prior written consent of the City, which consent may be granted, denied or conditioned in the sole and reasonable discretion of the City; provided, however, the leasing or sale of individual units within the Project by the City or the Developer within the normal course of business shall not be construed as an assignment of this Agreement. The City shall have the right to assign or otherwise transfer this Agreement to the City or to any successor entity created by the City to perform the same functions as the City and upon such assignment or other transfer, this Agreement shall be binding upon and shall inure to the benefit of the City or to any such successor entity.

## **ARTICLE XVI EQUAL EMPLOYMENT OPPORTUNITY**

Section 16.01 Equal Employment Opportunity During Performance of this Agreement. During the performance of this Agreement, the Developer agrees, for itself and its successors and assigns, as follows:

(a) The Developer will not discriminate against any employee or applicant for employment because of race, color, religion, sexual orientation, family status, handicap, sex, or national origin. The Developer will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex or national origin. Such action shall include, but not be limited to the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Developer agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the City setting forth the provisions of this nondiscrimination clause.

(b) The Developer will, in all solicitations or advertisements for employees placed by or on behalf of the Developer, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sexual orientation, family status, handicap, sex or national origin.

(c) The Developer will send to each labor union or representative of workers with which it has a collective bargaining agreement or other contract or understanding, a notice advising the labor union or workers' representative of the Developer's commitments



under Section 202 of Executive Order 11246, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.

(d) The Developer will comply with all provisions of the Executive Order, and of the rules, regulations and relevant orders of the Secretary of Labor.

(e) The Developer will furnish all information and reports required by the Executive Order, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to its books, records and accounts by the City and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Developer's non-compliance with the non-discrimination clauses of this Agreement or with any of such rules, regulations, or orders, this Agreement may be canceled, terminated or suspended in whole or in part and the Developer may be declared ineligible for further government contracts and/or federally assisted construction contracts in accordance with the procedures authorized in the Executive Order, and such other sanctions may be imposed and remedies invoke as provided in the Executive Order, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.

Section 16.02 Inclusion of Equal Employment Opportunity Provisions in Contracts. The Developer agrees, for itself and its successors and assigns, that it will include the provisions listed in Section 16.01 in every contract or purchase order unless exempted by the rules, regulations, or orders of the Secretary of Labor issued pursuant to section 204 of Executive Order 11246, so that such provision will be binding upon each contractor or vendor that does business with the Developer in conjunction with the Project, as well as those contractor's subcontractors. For the purpose of including the provisions of Section 16.01 in any construction contract or purchase order, the terms "City", "Developer" and "Contract" may be changed to appropriately reflect the name or designation of the parties to such contract or purchase order.

Section 16.03 Modification of Requirements. Upon the issuance of additional or conflicting rules, regulations, or orders of the Secretary of Labor pursuant to section 204 of the Executive Order, the requirements of this Article shall automatically be amended to conform and comply with such changes.

Section 16.04 Determination of Compliance. For the sole purpose of determining the Developer's compliance with the provisions of this Article, the City and its duly appointed agents shall be permitted, at reasonable times, and after three (3) days prior notice to the Developer, to examine the books and records of the Developer.

## **ARTICLE XVII AMERICANS WITH DISABILITIES ACT**

The Developer shall comply with the provisions of the Americans with Disabilities Act ("ADA"), 42 U.S.C. A Section 1201, et seq., as amended from time to time, and regulations

promulgated under the ADA, including, without limitation, 28 C.F.R. Part 35 and 29 C.F.R. Part 1630.

## **ARTICLE XVIII**

**[reserved]**

## **ARTICLE XIX**

**[reserved]**

## **ARTICLE XX MISCELLANEOUS PROVISIONS**

Section 20.01 Amendments. This Agreement may not be amended, modified, terminated or waived orally, but only by a writing signed by the party against whom any such amendment, modification, termination or waiver is sought.

Section 20.02 No Oral Agreements. This Agreement, together with all exhibits referred to in this Agreement contain all the oral and written agreements, representations and arrangements between the parties, and any rights which the parties may have under any previous contracts or oral arrangements are hereby canceled and terminated and no representations or warranties are made or implied, other than those set forth in this Agreement.

Section 20.03 Binding Effect. This Agreement shall inure to, the benefit of and shall be binding upon the City and its successors and assigns and the Developer and its permitted successors and assigns.

Section 20.04 Severability. The provisions of this Agreement are severable. In the event that any provision of this Agreement is held to be invalid, illegal or unenforceable to any extent, then the remaining provisions of this Agreement, and the portion of the offending provision (or any application of such provision) which is not invalid, illegal or unenforceable shall remain in full force and effect.

Section 20.05 Conflict of Interest. No council member, officer or employee of the City taking official action with respect to this Agreement or the Project shall have any personal interest, direct or indirect, in the Project, the Property or this Agreement, nor shall any such commissioner, officer or employee participate in any decision relating to the Project, the Project, Property or this Agreement which affects his personal interest or the interest of any corporation, partnership or association in which he is directly or indirectly interested.

Section 20.06 Execution of Counterparts. This Agreement may be executed in two (2) or more counterparts, each of which shall be deemed to be an original and all of which together shall constitute but one and the same instrument.

Section 20.07 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State without regard to conflict of laws.

Section 20.08 Notices. Any notice, approval, request or consent required by or permitted under this Agreement shall be in writing and mailed by United States registered or certified mail, postage prepaid, return receipt requested, or delivered by hand, and addressed as follows:

To City: City of Ames, Iowa  
Planning & Housing Department,  
Attention: Housing Coordinator  
515 Clark Ave, PO Box 811  
Ames, IA 50010

With a copy to: Legal Department  
Attention: City Attorney  
515 Clark Ave, PO Box 811  
Ames, IA 50010

To Developer: Prairie Fire Development Group, LLC  
Attention: Kelley Hrabe  
770 E 5<sup>th</sup> Street  
Kansas City, MO 64106

Builders Development Corporation  
Attention: Tom Cole  
600 E 103<sup>rd</sup> Street, Suite 200  
Kansas City, MO 64131

With a copy to: Spencer Fane  
Attention: S. Shawn Whitney  
2144 E. Republic Road  
Suite B300  
Springfield, Missouri 65804

Each Party shall have the right to specify that notice be addressed to any other address by giving to the other party ten (10) days prior written notice thereof.

All notices given by mail shall be effective upon the earlier of the date of receipt or the second (2nd) business day after deposit in the United States mail in the manner prescribed in this Section. Rejection or other refusal to accept or the inability to deliver because of changed address for which no notice was given, shall be deemed to be receipt of the notice as of the date of such rejection, refusal or inability to deliver.

Section 20.09 Recording. This Agreement or a memorandum of this Agreement may be recorded by the City, from time to time, in the office of the Recorder of Story County, Iowa. The

Developer shall pay the costs of recording the Contract or memorandum upon demand by the City.

Section 20.11 Further Assurances. The Developer will do, execute, acknowledge and deliver such further acts, instruments, financing statements and assurances as the City may reasonably require for accomplishing the purposes of this Agreement.

Section 20.12 Access to Project and Inspection. During the Term of the Developer's ownership of the portion of the Property in which the City seeks to conduct an examination or inspection, the City and its duly appointed agents shall have the right, at all reasonable times, to enter upon the Property and Project Improvements and to examine and inspect the Property, provided that such entry shall be at the sole risk of the City and shall be subject to reasonable coordination with and direction by the Developer, and further provided that such inspections shall not unreasonably interfere with the development activities of the Developer and its agents and contractors. The Developer covenants to execute, acknowledge and deliver all such further documents and do all such other acts and things as may be reasonably necessary to grant to the City such right of entry. The City and its duly appointed agents shall also have the right, at reasonable times and upon seven (7) days prior written notice, to examine the books and records of the Developer which relate to the Project and/or to the obligations of the Developer under this Agreement.

Section 20.13 Affordability Requirements. The Developer agrees that a minimum of 31 of 36 housing units, or as otherwise agreed upon by the City, will be affordable and available for rent, pursuant to this agreement

Section 20.14 City Approvals. The approvals required by the City under this Agreement may be made administratively and in writing by the City's City Administrator or his designee; provided, however, if, in the City's City Administrator's or his designee's sole discretion, a matter must be presented to the City Council for the City's approval, then such matter shall be presented to the City Council for such approval at a regular or special meeting called by the City Council.

[ S I G N A T U R E S   T O   F O L L O W ]

IN WITNESS WHEREOF, the Developer has caused this Development Agreement to be executed in its name and attested by its duly authorized officers. The City has caused this Development Agreement to be executed in its name with its affixed and attested by its duly authorized officers. All of the above occurred as of the date first above written.


CITY OF AMES IOWA

By: \_\_\_\_\_  
John A. Haila, Mayor

ATTEST:

By: \_\_\_\_\_  
Diane R. Voss, City Clerk

PRAIRIE FIRE DEVELOPMENT GROUP, LLC

By:  \_\_\_\_\_  
Kelley Hrabe, Manager

BUILDERS DEVELOPMENT CORPORATION

By:  \_\_\_\_\_  
Tom Cole, Executive Director

## **EXHIBIT LIST**

Exhibit A – Legal Description

## **EXHIBIT A**

### **Legal Description of the Property**

Lot 27, Baker Subdivision, Ames, Iowa.