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DEVELOPMENT AGREEMENT

by and among

THE CITY OF MADISON, WISCONSIN,

and

BEITLER REAL ESTATE SERVICES, LLC

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## **EXHIBITS**

- Exhibit A      Legal Description of the Property
- Exhibit B      Ground Lease Agreements Term Sheets
- Exhibit C      Master Development Schedule
- Exhibit D      Developer Services

## DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (this “Agreement”), dated as of \_\_\_\_\_, 2016 (the “Effective Date”), is made by and among the CITY OF MADISON, a Wisconsin municipal corporation (the “City”), and BEITLER REAL ESTATE SERVICES, LLC an Illinois limited liability company (the “Developer”).

### RECITALS

WHEREAS, the City owns certain real property more fully described on Exhibit A as the “City Parcel” and the “Utility Parcel” (collectively, the “Property”);

WHEREAS, the City and the Developer desire to cooperate in the development of the Property as a public-private project in accordance with the terms of this Agreement; and

WHEREAS, the parties hereby desire to enter into this Agreement to set forth the following terms and conditions related to the development of the Property.

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

### ARTICLE I

#### DEVELOPMENT OF THE PROJECT

**Section 1.1. Development.** The City and the Developer will develop the Property in accordance with this Agreement and will cooperate with one another in connection therewith.

**Section 1.2. Project Description.** The development of the Property contemplated by this Agreement consists of two primary components: (1) the “Private Development” and (2) the “Public Development” (collectively, the “Project”), with each primary component comprised of several sub-components (each, a “Project Element”), as generally described below:

(a) **Private Development.** The Private Development consists of the following three Project Elements, each a Private Development Project Element:

(1) an apartment component comprising of approximately 144 units within approximately 128,000 gross square feet of floor area and a retail component comprising approximately 33,400 gross square feet plus ancillary parking in a building to be constructed by the Developer on Block 88 (the “Block 88 Apartment”) with the final unit count subject to completion of design development documents and completion of a market and feasibility analysis to be prepared by the Developer and land use approvals as described in Article IV;

(2) an apartment component comprising of approximately 210 units within approximately 192,000 gross square feet of floor area and a retail component comprising approximately 7,800 gross square feet plus ancillary parking in a building to be constructed by the Developer on Block 105 (the “Block 105 Apartment”) with the

final unit count subject to completion of design development documents and completion of a market and feasibility analysis to be prepared by the Developer and land use approvals as described in Article IV; and

(3) an urban mixed use hotel component having no fewer than 250 guest rooms within approximately 164,000 gross square feet of floor area plus ancillary parking in a building to be constructed by the Developer on Block 105 (the “Block 105 Hotel”) with the final room count subject to completion of design development documents and completion of a market and feasibility analysis to be prepared by the Developer and land use approvals as described in Article IV.

(b) Public Development. The Public Development consists of the following Project Elements, which will be constructed and paid for by the City:

(1) a parking component with approximately 600 structured parking stalls (the “Public Ramp”), to be constructed by the City on Block 88 for operation as public parking; and

(2) a proposed Bike Center (as further defined in Section 5.1 (a) below). For all purposes of this Agreement, the defined term “Public Ramp” shall be inclusive of the Bike Center, if constructed.

## ARTICLE II

### DIVISION AND LEASING OF THE PROPERTY

**Section 2.1. Real Estate Leases.** Subject to Section 5.1(e) and in accordance with Section 6.2, upon completion of the Public Ramp the City shall lease to Developer and Developer shall lease the portions of the Property described as the Utility Parcel (hereinafter, the “Block 105 Development Parcel”) and the area above the Public Ramp (the “Block 88 Apartment Parcel”) for the purpose of development. Each Project Element may have its own lease, but each shall be on terms substantially attached hereto as Exhibit B (collectively, the “Ground Lease Agreements”). The consummation of the Ground Lease Agreements shall occur prior to commencement of the Private Development as described in 5.2(d) and on the Master Development Schedule (defined below), unless otherwise agreed to by the parties. A short form memorandum of each Ground Lease Agreement shall be recorded immediately prior to commencement of the subject Private Development Project Element.

**Section 2.2. Real Estate Holding Company.** To facilitate the overall development of the Project, the Developer may, assign its rights and obligations under one or more of the Ground Lease Agreements to one or more entities to be formed by the Developer (the “Holding Company or Holding Companies” as the case may be) as further set forth in the Ground Lease Agreements.

**Section 2.3. Certified Survey Map.** As soon as reasonably possible after the Effective Date and prior to the Public Development Closing, the City shall prepare and approve, by resolution of the common council, a two-lot certified survey map (the “CSM”) for the purpose of dividing Block 88 into two parcels consisting of (a) the parcel of land upon which the Madison

Municipal Building is situated (the "MMB Parcel"); (b) the remaining portion of Block 88 (the "Block 88 Development Parcel"). The Block 88 Development Parcel and the Block 105 Development Parcel are collectively referred to herein as the "Project Parcel". The CSM shall be executed by the City and delivered for recording at the Public Development Closing. Upon recording of the CSM, the MMB Parcel and the Block 88 Development Parcel shall constitute legally separate parcels with separate tax parcel numbers assigned to each.

### ARTICLE III

#### PUBLIC DEVELOPMENT FINANCING

**Section 3.1. Closing.** The closing of the financing phase (described in this Article III) and the Public Development entitlement phase of development (described in Article IV below) (the "Public Development Closing") shall take place at a date, time and location mutually acceptable to the parties but no later than May 1, 2017 (the "Public Development Closing Deadline"), except as may otherwise be agreed to in writing by the parties.

**Section 3.2. Summary of Funds for Project Development.** The City shall be responsible for all of the costs of the Public Ramp, at the City's sole cost and expense (the "Public Funding"). The Public Funding shall be drawn from a variety of sources, such as TID 25, the existing cash reserves of the City's parking utility, or other sources.

**Section 3.3. Sources and Uses of Public Funds.** The City shall provide funding for the Public Ramp in the amounts and for the purposes set forth in this Section 3.3, which amounts shall be committed to the Project prior to the Public Development Closing and will be disbursed to pay for the cost of constructing the Public Ramp. All funds listed below are approximate and are subject to change based on actual costs of work through a public works bidding process.

(a) Parking Utility Reserves and TID 25 for Public Ramp. The sum of Thirteen Million Dollars (\$13,000,000), drawn from the cash reserves of the City's parking utility, and Twenty-Four Million dollars (\$24,000,000) drawn from TID 25, to be used for the construction of the Public Ramp.

(b) Fleet Parking Costs. The sum of One Million Dollars (\$1,000,000) to pay for the cost of constructing forty (40) structured parking spaces within the Public Ramp Unit for vehicles in the City's fleet.

(c) Bike Center. The sum of One Million and no/100 Dollars (\$1,000,000.00) to pay for the cost of constructing the Bike Center within the Public Ramp Unit.

(d) Excess Costs. Any funds required for completion of the Public Ramp beyond those stated above will be paid for by the City, subject to further appropriation.

## ARTICLE IV

### LAND USE APPROVALS; PERMITTING

#### **Section 4.1. Land Use Approvals.**

(a) Applications. As soon as reasonably possible after the Effective Date, the City and the Developer will submit application materials required under the City of Madison municipal code for zoning, urban design and any other municipal land use and development approvals required in order to undertake the Project (collectively, the “Land Use Approvals”). A master schedule for development of the Project, including the schedule for the pursuit of the Land Use Approvals, is attached hereto as Exhibit C (the “Master Development Schedule”). All applications for Land Use Approvals shall be reviewed in accordance with the ordinances of the City of Madison, provided, however, without in any way limiting the generality of the foregoing, the City and the Developer shall each diligently and in good faith attempt to follow the Master Development Schedule.

(b) Planned Development. The City and the Developer acknowledge and agree that the Project Parcel may be rezoned to a Planned Development District under section 28.098 of the Madison General Ordinances in order to accommodate the Project. If the Project Parcel is rezoned to a Planned Development District, as part of the Land Use Approvals, the Developer will seek approval of a General Development Plan (“GDP”) pursuant to section 28.098(5)(c) of the Madison General Ordinance. The City and Developer further acknowledge that each Project Element shall be subject to the City’s review and approval as part of a Specific Implementation Plan (“SIP”), pursuant to section 28.098(5)(e) of the Madison General Ordinances, provided, however, nothing shall preclude Developer from combining one or more Project Elements into a single SIP application.

(c) City Cooperation. The City will reasonably cooperate with and assist the Developer in applying for and processing the applications for Land Use Approvals in connection with the Private Development for Land Use Approvals for the entire Project within the Master Project Schedule.

**Section 4.2. Building and Construction Permits; Fees.** The Developer shall comply with all applicable City building codes and construction requirements and shall be responsible for obtaining all building permits with respect to construction of the Private Development and the Developer shall pay the normal and customary City charges and shall be responsible for obtaining all building permits prior to such construction. The City shall comply with all applicable City building codes and construction requirements and shall be responsible for obtaining all building permits with respect to construction of the Public Ramp and the City shall pay the normal and customary City charges and shall be responsible for obtaining all building permits prior to such construction.

## ARTICLE V

### CONSTRUCTION OF PROJECT

#### Section 5.1. Public Ramp.

(a) Developer Administration. The City acknowledges that the Developer was selected by the City to pursue development of the Project at the City's invitation. In that role, the Developer has provided and will continue to provide valuable assistance to the City in the planning, design and construction management of the Public Development component of the Project.

(1) Unless otherwise notified, the main point of contact for the development of the Public Development for the Developer shall be J. Paul Beitler ("Developer Agent") and the main point of contact of the City will be determined by the City in advance of Developer providing services as described in subparagraph (2) ("City Agent"). The Developer Agent and City Agent are each authorized to act on behalf of and enter into agreements on behalf of their respective parties.

(2) The City has allocated funding in the City's 2016/2017 capital budget for the planning, design and construction of the Public Development. Notwithstanding the foregoing, the Developer shall provide developer administration services outlined in Exhibit D, pursuant to which the Developer shall manage the Public Development in coordination with the development of the overall Project.

(b) Design. Commencing as of the Effective Date and continuing through the Public Development Closing, the City shall prepare detailed plans and specifications for the Public Ramp. The program for the Public Ramp may include a Bike Center consistent with criteria established in the Request for Proposals for Judge Doyle Square issued by the City (the "Bike Center"). The design of the Public Ramp shall be approved by the City prior to the Public Development Closing.

(c) Bidding. The City shall publicly advertise, bid and contract for the construction of the Public Ramp in accordance with applicable Wisconsin law governing such public construction. Statutory bid bonds, performance bonds and payment bonds shall be required for the Public Ramp in a form, and from sureties, approved by the City. The City shall prepare all public bidding documents, contracts and bonds. All contracts for construction of the Public Ramp shall be awarded by the City to the lowest responsible bidder (the "Public Ramp Construction Contracts").

(d) Construction. The City shall be solely responsible for the total cost and expense involved in: (i) demolition of all improvements located on the Block 88 Development Parcel prior to the Public Development Closing; (ii) demolition of the Government East parking ramp, except for that portion required to support the adjacent buildings, prior to Private Development Closing; (iii) construction of the Public Ramp in accordance with plans and specifications approved pursuant to Section 5.1(b); and (iv) costs associated with any demolition, construction or reconstruction of the Pinckney Street, Doty Street and Wilson Street public rights-of-way,

including, without limitation, paving, utilities, sidewalk, landscaping, and lighting incorporated into such reconstructed public rights-of-way up to the costs necessary for the City to replace the rights-of-way to the condition shown on the approved Project plans, except that Developer shall pay the entire cost of reconstructing the curbs and sidewalks on the Block 105 Development Parcel. Any additional costs associated with design or construction elements resulting from the construction of the Private Development shall be at the expense of the Developer.

(e) Commencement. Commencement of construction of the Public Ramp shall take place immediately following Public Development Closing. The City shall be permitted to continue operating the Government East parking structure at its sole cost and expense until its demolition. Should Developer determine that it is in the best interest of the Project that construction commence sooner on Block 105 and that the Government East parking ramp be demolished before Public Ramp completion, City shall be permitted time to find adequate replacement parking, the suitability and adequacy of which shall be determined in the City's sole discretion. Under no circumstances will the City be compelled to demolish Government East or stop its use as a public parking ramp until said replacement parking is ready for use.

(f) Completion. Subject to Unavoidable Delays, the City shall cause the Public Ramp to be completed no later than November 30, 2018 (the "Public Ramp Completion Date"). Construction of the Public Ramp will be performed in accordance with this Agreement, the Public Ramp Construction Contracts, and the generally accepted standards of care, skill, diligence and professional competence applicable to contractors engaged in providing similar construction work at the time and in the locality where the work is performed and will be free of defects. As used in this Agreement, the term "Unavoidable Delays" means delays which are the direct result of strikes or other labor troubles, lack of responsible bidders, actual and reasonable delays caused by a failure to receive any bids that would not cause the estimated cost of the Public Ramp to exceed the authorized amounts, unforeseeable and unavoidable casualties to the Project, governmental actions, judicial action commenced by third parties, the implementation of an environmental agency-approved work plan for remediation, or severe weather, acts of God, fire or other casualty, or other events or conditions beyond the reasonable control of the parties.

## **Section 5.2. Private Development.**

(a) Design. The Developer shall prepare and submit detailed plans and specifications for the Private Development for review and approval by the City.

(b) Pre-development Costs. The Developer shall be solely responsible for all pre-development costs associated with the Private Development, including, without limitation, architectural, engineering, planning and design fees; legal, accounting and other professional fees; and any, filing or other development fees.

(c) Bidding. No portion of the Private Development shall be construed as "public construction" and, as such, the Developer shall not be required to comply with Wisconsin law governing public construction, including but not limited to Wis. Stat. §§ 62.15, 66.0901 and 779.14, with respect to the Private Development.

(d) Construction. The Developer shall be solely responsible for the total cost and expense for the construction of the Private Development. The closing of financing of no fewer than one Private Development Project Element (the “Private Development Closing”) shall occur no later than twenty-four (24) months after Public Ramp Completion Date (the “Private Development Closing Deadline”). The closing of financing for the second and third Private Development Project Elements shall occur no later than thirty-six (36) months after Public Ramp Completion Date.

(e) Targeted Business Participation. The Developer shall include in its contract with its general contractor (the “Private Development General Contractor”) express provisions requiring the Private Development General Contractor to use its best efforts to encourage the participation of local businesses, minority business enterprises (MBE), women business enterprises (WBE) and disadvantaged business enterprises (DBE) as subcontractors or vendors for the Project, with a goal of having not fewer than ten percent (10%) of all construction and/or supply contracts for the Private Development, as measured by overall contract value, awarded to targeted businesses.

(f) Project Labor Agreement. The Private Development General Contractor will be responsible for all organized labor agreements in accordance with customary practices in the Madison market.

(g) Commencement. Subject to Unavoidable Delays, commencement of construction of the Private Development shall take place in accordance with the Master Development Schedule.

(h) No-Build Easements. If needed to facilitate the development of the Project, the City and the Developer (if the Block 88 Apartment Parcel is affected thereby) shall, as of the Private Development Closing, execute and record a mutually acceptable reciprocal no-build easement and reciprocal access easement encumbering portions of the Block 88 Development Parcel and the MMB Parcel.

### **Section 5.3. Block 105 Hotel.**

(a) Design; Style, Size; Location. The Block 105 Hotel shall be built in accordance with the terms of Section 1.2(a)(3).

(b) City Council Approval. The plans for the Block 105 Hotel advanced by the Developer will address or incorporate the following concepts, each of which will be subject to review and approval by resolution of the City Council prior to the Private Development Closing:

(1) *Brand and Operator*. The Developer’s selection of (i) a hotel franchise company offering an appropriate and credible brand for the Block 105 Hotel with a national sales force and reservation system and (ii) an experienced hotel operator reasonably acceptable to the City and Developer.

(2) *Room Block Agreement*. A room block agreement to support the Monona Terrace Community and Convention Center.

(c) Labor Peace Agreement. No later than the Block 105 Hotel opening date, the Developer and/or its successor in interest shall supply to the City evidence that the Developer, or its successor in interest, has entered into (or caused the Hotel operator to enter into) good faith negotiations for a labor peace agreement with a labor organization that validly represents hotel employees and seeks to represent the Block 105 Hotel workers (the “Labor Peace Agreement”). If executed, the Labor Peace Agreement must be a valid agreement which prohibits the labor organization and its members from engaging in any picketing, work stoppages, boycotts, or any other economic interference with the Block 105 Hotel, and must cover all operations of the Block 105 Hotel which are subject to the management agreement or a lease with the Block 105 Hotel operator (other than construction, alteration or repair of the premises). If executed, the Labor Peace Agreement shall not include any provision that would require or compel an employee to be a member of the labor organization. This Section 5.3(c) is not intended to favor any particular outcome in the determination of employee preference regarding union representation and neither Developer nor the labor organization shall be deemed to waive any rights. The Developer may be relieved of this obligation by the Common Council if the labor organization places conditions upon the Labor Peace Agreement that would be commercially unreasonable, arbitrary or capricious, or inconsistent with federal or state law.

## ARTICLE VI

### CONDITIONS PRECEDENT TO PROJECT COMMENCEMENT

**Section 6.1. Conditions Precedent to Public Development Commencement.** The City’s obligations to complete the financing and entitlement phases of development and undertake the Public Development contemplated by this Agreement are conditioned on timely satisfaction of each of the following conditions (collectively, the “Public Conditions Precedent”) at or prior to the Public Development Closing Deadline:

- (a) Approval by the City Council of the CSM
- (b) Delivery of the fully-executed CSM by the City, to be recorded by the parties at the Public Development Closing, as set forth in Section 2.3.
- (c) Approval within the City’s 2016 and/or 2017 capital budget of all of the funds required of the City under this Agreement.
- (d) Certification of an amendment to the Project Plan for TID 25 by the Wisconsin Department of Revenue.
- (e) Receipt of all Land Use Approvals necessary to initiate the Public Development.
- (f) Approval by the City of the plans and specifications for the Public Ramp, including the Bike Center, as set forth in Section 5.1 (a).

**Section 6.2. Conditions Precedent to Private Development Commencement.** The Developer’s obligations to complete the financing and entitlement phases of development and

undertake the Private Development contemplated by this Agreement are conditioned on timely satisfaction of each of the following conditions (collectively, the “Private Conditions Precedent”) at or prior to the Private Development Closing Deadline:

- (a) Completion of the Public Conditions Precedent.
- (b) Subject to Section 5.1(e), completion of the Public Ramp.
- (c) Execution of the Ground Lease Agreements, short form memoranda of which are to be recorded by the parties prior to commencement of the Private Development.
- (d) Approval of land use for each Project Element included in the Private Development.
- (e) Approval by the Common Council of each element of the Block 105 Hotel development set forth in Section 5.3(b).
- (f) Delivery by the City to the Developer, and acceptance by the Developer, of a current Phase I environmental report, and any follow-up testing recommended thereby, covering the entire Property. If the Phase I or any follow-up testing reveal the need for remediation, this condition precedent shall also include the City paying all costs associated with the City obtaining a written “no further action” confirmation or a closure letter, if necessary, from the Wisconsin Department of Natural Resources (DNR).

## **ARTICLE VII**

### **INSURANCE**

**Section 7.1. Insurance.** The parties shall purchase and maintain such insurance coverages as may be required by the parties’ respective lenders and risk managers and as the parties otherwise agree is necessary to adequately protect the parties’ respective interests in the Project. The insurance policies and provisions to be set forth in the documents contemplated by this Agreement to be executed and delivered as part of the Public Development Closing and the Private Development Closing, as applicable, shall be subject to the review and approval of the City’s Risk Manager and the Developer.

## **ARTICLE VIII**

### **REPRESENTATIONS AND WARRANTIES**

**Section 8.1. Representations and Warranties by the City.** The City represents and warrants that:

- (a) The City is a municipal corporation duly organized and existing under the laws of the State. The City has the power to enter into this Agreement and carry out its obligations hereunder and provision has been made to pay the liability that will accrue under this Agreement.

(b) The City has no knowledge as to the presence of hazardous substances as the same are described in the regulations promulgated under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, and/or in the environmental laws of the State in, on or under the Property. With respect to the Project, the City of Madison is aware of no facts the existence of which would cause it to be in violation of any state, local or federal environmental law, regulation or review procedure, or which would give any person a valid claim under the environmental laws of the State.

(c) There is not pending, nor to the best of the City's knowledge after due inquiry is there threatened, any suit, action or proceeding against the City before any court, arbitrator, administrative agency or other governmental authority that materially and adversely affects the validity of any of the transactions contemplated hereby, the ability of the City to perform its obligations hereunder, or the validity or enforceability of this Agreement.

**Section 8.2. Representations and Warranties by the Developer.** The Developer represents and warrants that:

(a) The Developer is a limited liability company organized and validly existing under the laws of the State of Illinois.

(b) The Developer has duly authorized the execution of this Agreement and the performance of its obligations hereunder, and neither the execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, nor the fulfillment of or compliance with the terms and conditions of this Agreement, is prevented, limited by or conflicts with or results in a breach of, any indebtedness, agreement or instrument of whatever nature to which the Developer is now a party or by which it is bound, or constitutes a default under any of the foregoing.

(c) There are no pending or threatened legal proceedings of which the Developer has knowledge which seek to restrain or enjoin the transactions contemplated by this Agreement or which question the authority of the Developer to execute and deliver this Agreement or the validity of this Agreement.

## ARTICLE IX

### INDEMNIFICATION

**Section 9.1. Indemnification Covenants.** Indemnification clauses incorporated into any contracts resulting from this Agreement will be subject to review and approval by the CDA and the City's Risk Manager and City Attorney. In accordance with City of Madison Administrative Procedure Memorandum 1-1, the City cannot agree to indemnify any party without approval of the Common Council. Therefore, any contract resulting from this Agreement requiring the City to indemnify the Developer is subject to approval of the Common Council.

## ARTICLE X

### EVENTS OF DEFAULT

**Section 10.1. Notice and Opportunity to Cure.** Whenever any party to this Agreement alleges a default by the other, the party alleging the default shall provide written notice to the other specifying the nature of the default and the actions necessary to cure the default. [Subject to Unavoidable Delays,][I]f the alleged default is not cured within thirty (30) days after the defaulting party's receipt of such notice, the non-defaulting party may take any one or more of the actions set forth below:

(a) The non-defaulting party may suspend its performance under this Agreement until it receives assurances from the defaulting party that the defaulting party will cure its default and continue its performance under this Agreement.

(b) The non-defaulting party may cancel and terminate this Agreement.

(c) Take whatever action, including legal, equitable or administrative action, which may appear necessary or desirable to the defaulting party, including any actions to collect any payments due under this Agreement or to pursue any claims for monetary damages at law or to enforce performance and observance of any obligation, agreement, or covenant to the defaulting party under this Agreement.

The non-defaulting party may elect to take no such action, notwithstanding an Event of Default not having been cured within said thirty (30) day period, if the defaulting party provides the non-defaulting party with written assurances satisfactory to the non-defaulting party that the Event of Default will be cured as soon as reasonably possible. No notice of such election by the non-defaulting party shall be required.

**Section 10.2. No Remedy Exclusive.** No remedy hereunder is intended to be exclusive of any other available remedy or remedies, but each and every such remedy shall be cumulative and shall be in addition to every other remedy given under this Agreement or now or hereafter existing at law or in equity. No delay or omission to exercise any right accruing upon any default shall impair any such right or shall be construed to be a waiver thereof, but any such right may be exercised from time to time and as often as may be deemed expedient.

**Section 10.3. No Implied Waiver.** In the event any agreement contained herein should be breached by any party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed a waiver of any rights or remedies which the non-breaching party shall have and shall not be deemed a waiver of any subsequent default of any such terms, conditions and covenants to be performed hereunder.

## ARTICLE XI

### ADDITIONAL PROVISIONS

**Section 11.1. Amendments; Incorporation of Exhibits.** As the parties continue work on the pre-development activities contemplated herein and prepare the various agreements referenced above in connection with the design, development, and financing of the Project, the parties will amend this Agreement to incorporate additional details, terms and conditions and the various agreements referenced above may be appended as exhibits to this Agreement. The parties may amend this Agreement, including but not limited to extending any deadlines, only by a written document agreed to by the parties, and in conformity with Section 11.2 below.

**Section 11.2. Consents and Approvals; Good Faith.** Except for matters for which there is a standard of discretion specifically set forth herein, wherever this Agreement provides for a determination, decision, selection, consent, approval, acceptance, adoption, satisfaction, or other action, the parties hereto shall exercise good faith in undertaking such actions and shall not unreasonably withhold, condition or delay any determination, decision, selection, consent, approval, acceptance, adoption, satisfaction or other action that may be necessary to fully implement the terms of this Agreement.

**Section 11.3. Conflict of Interests.** No member, official, or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interests or the interests of any corporation, partnership, or association in which he or she is, directly or indirectly, interested. No member, official, or employee of any party to this Agreement shall be personally liable to any other party, or any of their respective successors in interest, in the event of any default or breach by a party to this Agreement for any amount which may become due to any other party on any obligations under the terms of this Agreement, except in the case of willful misconduct.

**Section 11.4. Restrictions on Use.** The Developer shall not discriminate upon the basis of race, color, creed, sex or national origin in the sale, lease, or rental or in the use or occupancy of the Private Development, or any part thereof.

**Section 11.5. Broker's Commission.** The parties acknowledge that no broker's commission or finder's fee is payable with regard to this transaction. Each party agrees to indemnify and hold the other harmless from and against all liability, claims, demands, damages, or costs of any kind arising from or connected with any broker's commission or finder's fee or other charge claimed to be due any person arising from the indemnifying party's conduct with respect to this transaction.

**Section 11.6. Titles of Articles and Sections.** Any titles of the several parts, Articles and Sections of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of its provisions.

**Section 11.7. Notices and Demands.** Except as otherwise expressly provided in this Agreement, a notice, demand, or other communication under this Agreement by either party to the other shall be sufficiently given or delivered if it is dispatched by registered or certified mail, postage prepaid, return receipt requested, transmitted by facsimile, delivered by a recognized overnight carrier, or delivered personally to the following addresses:

If to the Developer:                   Beitler Real Estate Services, LLC  
Attn: J. Paul Beitler  
980 North Michigan Avenue, Suite 1225  
Chicago, IL 60611  
Phone: 312-768-7000  
Fax: 312-768-7001

With a copy to:                         Quarles & Brady LLP  
Attn: Kevin A. Delorey  
33 East Main Street, Suite 900  
Madison, WI 53703  
Phone: 608-283-2424  
Fax: 608-294-4909

If to City:                                 City of Madison  
Attn: Manager, Office of Real Estate Services  
215 Martin Luther King, Jr. Blvd., Room 312  
Madison, WI 53703  
Phone: 608-267-4933

With copy to:                             City Attorney  
City County Building, Room 401  
210 Martin Luther King Jr. Blvd.  
Madison, WI 53703  
Phone: 608-266-4511  
Fax: 608-267-8715

**Section 11.8. Counterparts.** This Agreement may be executed in counterparts, each of which shall constitute one and the same instrument.

**Section 11.9. No Third-Party Beneficiaries.** It is the intention of the parties to this Agreement that no person who is not a party signatory to this Agreement shall, under a third party beneficiary theory or otherwise, have any rights or interests hereunder as against the City, and no such other party shall have standing to complain of the City's exercise of, or alleged failure to exercise, its rights and obligations, or of its performance or alleged lack thereof, under this Agreement.

**Section 11.10. Litigation.** The City and the Developer will reasonably cooperate with one another with respect to any litigation commenced by third parties in connection with this Agreement, provided, however, that any party to this Agreement that is not a party to the actual litigation shall not be required to incur substantial expense in so cooperating.

**Section 11.11. City Contracting Requirements.** It is acknowledged and agreed that the Developer and its assigns will comply with the following section which incorporate language from the Madison General Ordinances (MGO). Notwithstanding any provisions in the MGO that may create exemptions to any of the following sections, each of the contract section below and the relevant MGO language incorporated therein is deemed applicable and fully enforceable by the parties, provided, however, if any term of this Agreement is inconsistent with the terms of the MGO, the term of this Agreement shall control:

(a) **Accessibility Accommodations.** The Developer agrees to ensure the Private Development will be accessible to persons with physical disabilities, and that the Private Development is in compliance with section 39.05 of the Madison General Ordinances and the Americans with Disabilities Act, where applicable.

(b) **Non-Discrimination.** In the performance of its obligations hereunder, the parties agree not to discriminate against any employee or applicant for employment because of race, religion, marital status, age, color, sex, handicap, national origin or ancestry, income level or source of income, arrest record or conviction record, less than honorable discharge, physical appearance, sexual orientation, gender identity, political beliefs or student status. The parties further agree not to discriminate against any subcontractor or person who offers to subcontract on this Agreement because of race, religion, color, age, disability, sex, sexual orientation, gender identity, or national origin.

(c) **Workforce Utilization.** Developer agrees that, within thirty (30) days after entering into a contract with the Private Development General Contractor, Developer will cause the Private Development General Contractor to provide to the City of Madison Affirmative Action Department certain workforce utilization statistics, using a form to be furnished by the City.

If this Agreement is still in effect, or if the City enters into a new agreement with Developer, within one year after the date on which the form was required to be provided, Developer will cause the Private Development General Contractor to provide updated workforce information using a second form, also to be furnished by the City. The second form will be submitted to the City Affirmative Action Department no later than one year after the date on which the first form was required to be provided.

Developer further agrees that, for at least twelve (12) months after the Effective Date, it will notify the City of Madison Affirmative Action Department of each of its job openings at facilities in Dane County for which applicants for employment with Developer who are not already employees of Developer are to be considered. The notice will include a job description, classification, qualifications, and application procedures and deadlines. Developer agrees to interview and consider candidates referred by the Affirmative Action Department if the candidate meets the minimum qualification standards established by the Developer, and if the

referral is timely. A referral is timely if it is received by Developer on or before the date stated in the notice.

(d) Affirmative Action. The Developer agrees and understands that an Affirmative Action Plan is required from the Private Development General Contractor by this Agreement. Options C. and D. in Article IV below are not available to the Developer, per MGO sec. 39.02(9)(a)3., which requires the submission of an Affirmative Action Plan by all developers or other entities who enter into a contract authorized by Wis. Stat. § 66. 1105(3)(e), and their contractors and subcontractors. The Developer shall include the following provisions in the contract with the Private Development General Contractor and shall require that similar provisions be included by the Private Development General Contractor in all subcontracts. As used in this Section 11.11(d), the term “Developer” means the Private Development General Contractor.

#### Article I

The Developer shall take affirmative action in accordance with the provisions of this contract to insure that applicants are employed, and that employees are treated during employment without regard to race, religion, color, age, marital status, disability, sex, sexual orientation, gender identity, or national origin and that the employer shall provide harassment-free work environment for the realization of the potential of each employee. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation and selection for training including apprenticeship insofar as it is within the control of the Developer. The Developer agrees to post in conspicuous places available to employees and applicants notices to be provided by the City setting out the provisions of the nondiscrimination clauses in this contract.

#### Article II

The Developer shall in all solicitations or advertisements for employees placed by or on behalf of the Developer state that all qualified or qualifiable applicants will be employed without regard to race, religion, color, age, marital status, disability, sex, sexual orientation, gender identity, or national origin.

#### Article III

The Developer shall send to each labor union or representative of workers with which it has a collective bargaining Agreement or other contract or understanding a notice to be provided by the City advising the labor union or workers representative of the Developer's equal employment opportunity and affirmative action commitments. Such notices shall be posted in conspicuous places available to employees and applicants for employment.

#### Article IV

(This article applies only to non-public works contracts.)

The Developer agrees that it will comply with all provisions of the Affirmative Action Ordinance of the City of Madison including the contract compliance requirements. The Developer warrants and certifies that one of the following paragraphs is true (check one):

- 
- A. It has prepared and has on file an affirmative action plan that meets the format requirements of Federal Revised Order No. 4, 41 CFR part 60-2, as established by 43 CFR 51400 November 3, 1978, including appendices required by City of Madison ordinances or it has prepared and has on file a model affirmative action plan approved by the Madison Common Council.
- 
- B. Within thirty (30) days after the effective date of this contract, it will complete an affirmative action plan that meets the format requirements of Federal Revised Order No. 4, 41 CFR Part 60-2, as established by 43 CFR 51400, November 3, 1978, including appendices required by City of Madison ordinance or within thirty (30) days after the effective date of this contract, it will complete a model affirmative action plan approved by the Madison Common Council.
- C. Contractor believes it is exempt from filing an affirmative action plan because it has fewer than fifteen (15) employees and has filed, or will file within thirty (30) days after the effective date of this Contract, a form required by the City to confirm exempt status based on number of employees. If the City determines that Contractor is not exempt, the Articles of Agreement will apply.\*
- D. Contractor believes it is exempt from filing an affirmative action plan because its annual aggregate business with the City for the calendar year in which the contract takes effect is less than twenty-five thousand dollars (\$25,000), or for another reason listed in MGO 39.02(9)(a)2. If the City determines that Contractor is not exempt, the Articles of Agreement will apply.\*

*\* Options C and D under Article IV are not available to the Developer.*

#### Article V

(This article is not applicable)

#### Article VI

The Developer will maintain records as required by Section 39.02 (9)(f) of the Madison General Ordinances and will provide the City's Department of Affirmative Action with

access to such records and to persons who have relevant and necessary information, as provided in Section 39.02(9)(f). The City agrees to keep all such records confidential, except to the extent that public inspection is required by law.

#### Article VII

In the event of the Developer's or subcontractor's failure to comply with the Equal Employment Opportunity and Affirmative Action Provisions of this contract or Sections 39.02 and 39.03 of the Madison General Ordinances, it is agreed that the City at its option may declare the Developer ineligible for further City contracts, including any additional Ground Lease Agreements until the Affirmative Action requirements are met.

#### Article VIII

(This article is not applicable)

#### Article IX

(e) **Living Wage.** Developer agrees to require that the Private Development General Contractor and all subcontractors working on the Project pay all employees employed by Developer in the performance of this Agreement, whether on a full-time or a part-time basis, a base wage of not less than the City minimum hourly wage as required by Sec. 4.20, MGO.

(f) **Equal Benefits.** For the duration of this Agreement, the Developer agrees to require that the Private Development General Contractor and all subcontractors working on the Project offer and provide benefits to employees employed by them in the performance of the Project with domestic partners that are equal to the benefits offered and provided to married employees with spouses, and to comply with all provisions of Sec. 39.07, MGO. If a benefit would be available to the spouse of a married employee, or to the employee based on his or her status as a spouse, the benefit shall also be made available to a domestic partner of an employee, or to the employee based on his or her status as a domestic partner. "Benefits" include any plan, program or policy provided or offered to employees as part of the employer's total compensation package, including but not limited to, bereavement leave, family medical leave, sick leave, health insurance or other health benefits, dental insurance or other dental benefits, disability insurance, life insurance, membership or membership discounts, moving expenses, pension and retirement benefits, and travel benefits.

(1) **Cash Equivalent.** If after making a reasonable effort to provide an equal benefit for a domestic partner of an employee, the Private Development General Contractor is unable to provide the benefit, the Private Development General Contractor shall provide the employee with the cash equivalent of the benefit.

(2) **Proof of Domestic Partner Status.** The Private Development General Contractor may require an employee to provide proof of domestic partnership status as a prerequisite to providing the equal benefits. Any such requirement of proof shall comply with Sec. 39.07(4), MGO.

(3) Notice Posting, Compliance. The Private Development General Contractor shall post a notice informing all employees of the equal benefit requirements of this Agreement, the complaint procedure, and agrees to produce records upon request of the City, as required by Sec. 39.07, MGO.

(4) Subcontractors (Financial Assistance Only). This requirement also applies to employees of subcontractors hired by the Private Development General Contractor who expend at least twenty (20) hours a week at the project site funded by City financial assistance.

(g) Notification of Position Openings. The Developer agrees to require that the Private Development General Contractor notify the State of Wisconsin Department of Workforce Development and the local workforce development board established under 29 USC 2832 of any positions to be filled in Dane County, as required by Sec. 66.1105(6c), Wis. Stats.

(h) **Ban The Box.** Arrest and Criminal Background Checks. (Sec. 39.08, MGO. Applicable to contracts exceeding \$25,000.)

A. Definitions. For purposes of this section, “Arrest and Conviction Record” includes, but is not limited to, information indicating that a person has been questioned, apprehended, taken into custody or detention, held for investigation, arrested, charged with, indicted or tried for any felony, misdemeanor or other offense pursuant to any law enforcement or military authority.

“Conviction record” includes, but is not limited to, information indicating that a person has been convicted of a felony, misdemeanor or other offense, placed on probation, fined, imprisoned or paroled pursuant to any law enforcement or military authority.

“Background Check” means the process of checking an applicant’s arrest and conviction record, through any means.

B. Requirements. For the duration of this Agreement, the Developer shall require in its contract with the Private Development General Contractor that the Private Development General Contractor:

1. Remove from all job application forms any questions, check boxes, or other inquiries regarding an applicant’s arrest and conviction record, as defined herein.
2. Refrain from asking an applicant in any manner about their arrest or conviction record until after conditional offer of employment is made to the applicant in question.
3. Refrain from conducting a formal or informal background check or making any other inquiry using any privately or publicly available means of obtaining the arrest or conviction record of an applicant until after a conditional offer of employment is made to the applicant in question.
4. Make information about this ordinance available to applicants and existing employees, and post notices in prominent locations at the workplace with

information about the ordinance and complaint procedure using language provided by the City.

5. Comply with all other provisions of Sec. 39.08, MGO.

C. Exemptions: This section does not apply when:

1. Hiring for a position where certain convictions or violations are a bar to employment in that position under applicable law, or
2. Hiring a position for which information about criminal or arrest record, or a background check is required by law to be performed at a time or in a manner that would otherwise be prohibited by this ordinance, including a licensed trade or profession where the licensing authority explicitly authorizes or requires the inquiry in question.
3. The contractor is identified by the City as being subject to the Vulnerable Populations Resolution adopted by the Common Council on May 21, 1996 (Substitute Resolution No. 53, 279.)

To be exempt under sec. C. 1. or 2. above, Private Development General Contractor must demonstrate to the City that there is a law or regulation that requires the hiring practice in question. If so, the contractor is exempt from this section for the position(s) in question.

**Section 11.12. Exclusivity.** During the term of this Agreement, the Developer shall have the exclusive right to negotiate with the City concerning development, leasing and acquisition of the Property and the City agrees that it shall not directly or indirectly solicit or entertain any other proposals for such development, leasing or acquisition of the Property during the term of this Agreement.

**Section 11.13. Adequate Consideration.** The parties acknowledge and agree that this Agreement is intended to be binding and enforceable and each party waives any right to challenge the enforceability of this Agreement based on discretion afforded either party in evaluating the fulfillment of certain conditions precedent to the Public Development Closing and the Private Development Closing, as applicable. Each party covenants and agrees to act diligently and expeditiously, and to exercise good faith, in seeking to satisfy such contingencies. City acknowledges that this Agreement requires Developer to commit time and resources in pursuing the Project and that such expenditures constitute good and sufficient consideration to City for entry into this Agreement. Furthermore, the parties agree that, upon satisfaction or waiver of the last of the contingencies set forth herein, this Agreement shall be deemed affirmed without inclusion of such contingencies.

**Section 11.14. Sale to Tax Exempt Entity – PILOT Payment.** If Developer or its assigns sells or transfers any portion of or interest in the Property to a tax exempt entity (“Buyer”), whereupon such ownership or interest renders the Property or any portion thereof as property tax exempt, Buyer shall pay the City an annual payment in lieu of taxes (“PILOT”) in the amount of property tax last levied as of the date of sale to Buyer, frozen, until TID 25 is closed. The City of Madison shall share said PILOT in proportion with the overlying taxing jurisdictions. Buyer shall execute a PILOT Agreement and a mortgage in favor of the City in the amount of the PILOT payments (“Buyer’s Mortgage”) at the time of Buyer’s acquisition of the

Property. The Buyer's Mortgage and PILOT Agreement shall be released and terminated by the City upon the receipt by the City of the required PILOT payments.

## ARTICLE XII

### **TERMINATION OF AGREEMENT**

**Section 12.1. Termination.** This Agreement shall terminate upon the following:

(a) In the event all of the Public Conditions Precedent are not satisfied on or before the Public Development Closing Deadline, the Developer shall have the option to terminate this Agreement upon written notice to the City, unless the parties agree in writing to extend such date.

(b) In the event the Developer fails to comply with the schedule in Section 5.2(d), the City shall have the option to terminate this Agreement upon written notice to the Developer, unless the parties agree in writing to extend such date.

**Section 12.2. Expiration.** If not terminated pursuant to Section 12.1 above, this Agreement shall terminate upon the date all of the parties' other respective obligations hereunder are satisfied, but no such termination shall terminate any indemnification or other rights or remedies arising hereunder due to any default which occurred and was continuing prior to such termination.

**Section 12.3. Effect of Termination.** Upon termination of this Agreement pursuant to this Article XII, this Agreement shall be null and void and, except for obligations that expressly survive termination, neither party shall have any further obligations or liabilities hereunder. Upon such termination the Developer and the City shall deliver to each other such documents as may be necessary to evidence the termination of this Agreement.

*(Signatures begin on next page.)*

**CITY OF MADISON, WISCONSIN,**  
a municipal corporation

By: \_\_\_\_\_  
Paul R. Soglin  
Mayor

By: \_\_\_\_\_  
Maribeth Witzel-Behl  
City Clerk

APPROVED:

APPROVED AS TO FORM:

\_\_\_\_\_  
David P. Schmiedicke  
Finance Director

\_\_\_\_\_  
Michael P. May, City Attorney

\_\_\_\_\_  
Norman Davis  
Department of Civil Rights

The execution of this Agreement by City officials was authorized by Enactment No. \_\_\_\_\_,  
File No. \_\_\_\_\_, adopted \_\_\_\_\_, 2016.

**BEITLER REAL ESTATE SERVICES  
LLC**

By: \_\_\_\_\_  
J. Paul Beitler  
Manager

## **EXHIBIT A**

### **LEGAL DESCRIPTION OF THE PROPERTY**

#### **City Parcel**

Block 88, Madison, according to the original plat thereof, in the City of Madison, Dane County, Wisconsin.

#### **Utility Parcel**

Lots 1, 2, 3, 11, 12 and 13, Block 105, Madison, according to the original plat thereof, in the City of Madison, Dane County, Wisconsin.

## **EXHIBIT B**

### **GROUND LEASE AGREEMENTS TERM SHEET**

**Lessor.** The City of Madison

**Lessee.** Holding Company or Holding Companies

**Premises.** [place holder for real estate description]. It is anticipated that each Project Element will have its own ground lease.

**Term.** 98 years with two fifty (50) year extension options. The terms of the options are subject to compliance with § 77.21, Wis. Stat. pertaining to land transfers.

**Rent.** Block 88 Apartment Parcel: \$180,000 annually

Block 105 Apartment portion of Block 105 Development Parcel: \$225,000 annually

Block 105 Hotel portion of Block 105 Development Parcel: \$350,000 annually

**Rent Escalation.** Beginning in the fifth lease year, the Rent shall escalate five percent (5%) every five (5) years.

**Rent Commencement.** The first payment of Rent shall begin ten months after issuance of certificate of occupancy.

**Property/Leasehold Interest Taxes.** The Private Development shall pay its Property/Leasehold Interest Taxes.

**Insurance.** Lessee shall maintain, at its sole cost, a policy of commercial general liability insurance, in an amount to be agreed upon by the parties.

**Assignment and Transfer.** The Ground Lease Agreements are assignable and transferable subject to the approval of Lessor.

**Subordination.** Any debt encumbering the Private Development shall be subordinate to the Ground Lease Agreements.

**Termination.** The Ground Lease Agreements shall terminate upon the follow events: 1. at the end of the term of the Ground Lease Agreements, including any extensions; 2. in the event of default under the Ground Lease Agreements subject to the cure periods of those Ground Lease Agreements; 3.. upon mutual agreement of the parties. Upon termination, regardless of reason, the Premises and all improvements shall be returned to the City.

**Miscellaneous.** The provisions of Article XI of the Agreement shall apply to each Ground Lease Agreement.

## **EXHIBIT C**

### **MASTER DEVELOPMENT SCHEDULE**

#### **I. Land Use Approvals** (begins at the Effective Date)

- *Insert schedule / dates for the below*
  - (a) Approval by the City Council of the CSM
  - (b) Delivery of the fully-executed CSM by the City, to be recorded by the parties at the Public Development Closing, as set forth in Section 2.3.
  - (c) Approval within the City's 2016 and/or 2017 capital budget of all of the funds required of the City under this Agreement.
  - (d) Certification of an amendment to the Project Plan for TID 25 by the Wisconsin Department of Revenue per Section 6.1.
  - (e) Approval of the GDP for the Project per Section 4.1(b), if necessary.
  - (f) Approval of SIPs for the Public Development and the Private Development per Section 4.1(b), if necessary.
  - (g) Receipt of all other Land Use Approvals necessary to initiate the Project.
  - (h) Approval by the City of the plans and specifications for the Public Ramp, including the Bike Center, as set forth in Section 5.1 (a).
  - (i) Delivery by the City to the Developer, and acceptance by the Developer, of a current Phase I environmental report, and any follow-up testing recommended thereby, covering the entire Property, together with any necessary remediation and delivery of any applicable NFA/NFR letter(s) per Section 6.1.

#### **II. Public Development** (begins no later than the Public Development Closing Deadline)

*\*The bullet points below are estimated time frames*

- Working Drawings: 3-4 months
- Section 5.1(d)(i): 1 month
- Section 5.1(d)(iii): 12 months
- Section 5.1 (d)(ii): 1 month

**III. Private Development** (begins no later than the Private Development Closing Deadline  
subject to Section 5.1 (e))

*\*The bullet points below are estimated time frames*

- Feasibility Studies: 30-45 days
- Update Schematics: 30 days
- Price Schematics: 30-45 days
- Obtain Financing: 6-12 months
- Working Drawings: 4-5 months
- Construction: 18 months

## **EXHIBIT D**

### **DEVELOPER SERVICES**

#### **A. Predevelopment**

- Developer will review the design of the Public Development and coordinate the overall design with the Private Development and assist the City to prepare the Master Schedule for the Public Development.
- Developer shall work with the City to assist with the entitlement process of the Public Development including attending required public entitlement meetings, as needed.

#### **B. Preconstruction Consulting**

- Preconstruction Consulting Services will include attending major Public Development Design Team meetings, working closely with the City, the selected General Contractor, as well as the Architect and Engineers for the Public Development to complete the Design Documents during the Preconstruction Phase.
- Where appropriate, Developer will conduct in-depth value analysis of all major building systems as well as identify any significant value engineering opportunities throughout the Design Phase of the Public Development.
- The Developer shall review the structural elements within the Public Development required to support the private development and shall confirm the structural elements meet the needs of the Private Development or shall suggest changes as appropriate.
- The Developer shall provide the preferred locations of the mechanical, plumbing and electrical items that will be within the Public Development and are required to serve the Private Development. The Developer shall review the Public Development plans at various stages of completion and confirm the Private Development needs are met by the Private Development Plans or shall suggest modifications as appropriate. bid documents, to review bids received to assist with negotiating an appropriate form of agreement with the selected General Contractor for the Public Development.
- The Developer shall provide input into the design of the interface between the ramp and Private Development at ground level to insure that the Private Development's footprint, entrances/exits are compatible with the Public Development.

#### **C. Procurement**

The City shall be responsible for the Procurement of the Public Development.

**D. Construction**

- Attend major Public Development team meetings in Madison, WI for the Public Development and on-site field visits.
- Assist with resolving any design or coordination issues during the construction phase which could have impact on the Public Development cost or schedule for the Public Development.
- Make recommendations on ways to mitigate schedule delays for the Public Development, if any.

**E. Developer Administration Fee**

- For performance of the work set forth in Sections A-D above, the City shall pay Developer a developer administration.
- The Developer Fee will be billed monthly in monthly installments over the course of the Public Development (estimated to be 28 months (10 months of pre-construction and 18 months of construction) at a rate of \$200 per hour) commencing at the Effective Date.
- The Developer Fee will be a not-to-exceed amount of \$250,000.

**F. Miscellaneous**

- Developer, at Developer's sole cost and expense, may retain third party representatives, consultants, additional testing or peer review to assist Developer with services outlined in Sections A-D.