

CONTRACT FOR CONSTRUCTION OF PUBLIC IMPROVEMENTS THROUGH  
PRIVATE DEVELOPER  
TAX INCREMENT DISTRICT NUMBER SEVENTY-THREE

Between

PRESIDENT'S PLAZA, L.L.C.

and the

CITY OF RAPID CITY, SOUTH DAKOTA

THIS AGREEMENT, is made and entered into on this \_\_\_\_ day of \_\_\_\_\_, 2012, by and between President’s Plaza, L.L.C., a South Dakota limited liability company located at 528 Kansas City Street, Rapid City, SD 57701, herein after referred to as the “Developer,” and the City of Rapid City, a municipal corporation and political subdivision of the State of South Dakota, located at 300 Sixth Street, Rapid City, South Dakota 57701, herein after referred to as the “City.”

**RECITALS**

WHEREAS, pursuant to the power and authority granted to it under Chapter 11-9 of the South Dakota Codified Laws, the City created Tax Increment District Number seventy-three by resolution on May 21, 2012.

WHEREAS, on the same date, the City adopted by resolution a Project Plan for Tax Increment District Number Seventy-three which identifies expenditures for public improvements which qualify as project costs pursuant to SDCL 11-9-14 and SDCL 11-9-15.

WHEREAS, the purpose of this agreement is to establish under what conditions the Developer can be reimbursed from the proceeds of the tax increment district for the cost of the improvements which are included in the Project Plan. It further establishes the procedures by which the Developer may assign its right to any proceeds from the district in order to secure private financing for the project improvements. Pursuant to SDCL 11-9-2(5), the City is empowered to enter into contracts or agreements necessary and convenient to implement the provisions and effectuate the purposes of the Project Plan.

NOW THEREFORE, the parties hereby agree as follows:

SECTION 1. The estimated project costs for which the Developer can be reimbursed from Tax Increment District Number seventy-three as set forth in the approved Project Plan, are as follows:

Capital Costs:	
Public Parking Structure	\$ 9,242,500.00
Soil Removal	\$ 247,500.00
Alley Power Line Relocation	\$ 300,000.00
Professional Services Cost	\$ 924,250.00
Financing Costs:	
Financing interest	\$ 11,408,711.14
Contingency Costs:	\$ 462,125.00
Relocation Costs:	\$ 0

Organizational Costs:	\$ 0
Necessary and Convenient Costs:	\$ 500,000.00
TOTAL	\$ 23,085,086.14
Imputed Administrative Costs*	
City of Rapid City	\$ 2,050

\* The imputed administrative costs are interest-free, are not included in the total project costs, and are to be paid from the balance remaining in the TID #73 fund available to the City Finance Officer on May 1, 2017. The Finance Officer may withdraw monies from the fund until such time as this fee is paid in full.

SECTION 2. The Developer agrees to construct the public improvements contemplated by this agreement pursuant to the terms and conditions contained in the Master Development Agreement, dated September 21, 2009, and any addendums or modifications which have been made thereto. The Developer further acknowledges that the public improvements contemplated by this agreement must be under contract for construction no later than May 20, 2017. If the Developer has not entered into a contract for construction of the public improvements by May 20, 2017, the City may unilaterally terminate its obligations under this agreement.

SECTION 3. The base value of the property located in Tax Increment District Number Seventy-Three subject to adjustment based on the final certification by the South Dakota Department of Revenue is estimated to be Three Million Five Hundred Eighty-three Thousand and Six Hundred Dollars (\$3,583,600). When the Department of Revenue certification is received, it will be attached to and become a part of this Contract. If the certified value from the South Dakota Department of Revenue differs from this value, the Department of Revenue value shall be the base value.

SECTION 4. The Developer may secure private financing to fund the improvements contemplated in the approved Tax Increment District Number Seventy-three Project Plan. The City will only reimburse the Developer for the amount of interest actually paid to a financial institution providing funding for the public improvements contained in the Project Plan. If the Developer obtains private financing, the interest rate shall not exceed nine (9%) percent per annum during the life of the loan. At no time shall the actual interest paid exceed the maximum amount of financing interest identified in Section 1 of this agreement and the Project Plan. The Developer shall provide to the City Finance Office a Tax Increment Financing proposal from a prospective lender of its choosing which shall address these loan terms and conditions:

1. Fixed or variable interest rate, if variable state frequency of pricing adjustments
2. Interest rate index

3. Interest rate spread over/under index, if any
4. Loan term
5. Collateral
6. Guaranty requirements from the developer
7. All identity of interests between developer and lender

The City Finance Officer will review and analyze the proposed financing terms and forward a recommendation for approval or disapproval to the City Council. If the City Finance Officer concludes that the proposal is not competitive with current market conditions or is otherwise unsatisfactory, a report detailing the deficiencies shall also be forwarded to the City Council. The City Council will review and must either approve or disapprove the financing package. The Council's decision to approve or disapprove the financing shall be based on the competitiveness of the package with current market conditions or based on the financing package containing conditions which are unacceptable to the City or otherwise violate any laws or policies. Such approval shall not be unreasonably withheld. The Developer is required to submit and obtain approval of the financing package prior to the date for transfer of the land at the corner of St. Joseph and 5<sup>th</sup> Street as specified in the Master Development Agreement and any addendums thereto. The Developer will also be required to submit this information and have the Finance Officer review and make a recommendation to the City Council prior to approval of any request for refinancing. The City further reserves the right to require the refinancing of any existing tax increment finance loan utilizing whatever means the City decides most beneficial to the taxpayers, including the issuance of revenue or other bonds, at any time during the term of this Agreement. This shall include the City's right to require the Developer to assign and/or reassign the Tax Increment Finance loan to the City or any other entity designated by the City. If the City chooses to finance or refinance the Tax Increment Finance loan the City will be eligible for reimbursement from the Tax Increment District Seventy-three fund of any project or financing costs it actually incurs.

SECTION 5. Developer shall complete the improvements described in the approved Project Plan. Upon completion of the improvements the Developer shall certify to the City Finance Officer that such improvements have been completed and shall certify the amount of money disbursed therefore. The Developer shall provide sufficient documentation to certify that the terms of Section 10 of this agreement are complied with. The City shall have the right to require reasonable documentation to establish that the amounts set forth in the Tax Increment District Number Seventy-three Project Plan have, in fact, been disbursed for the costs contemplated in the Project Plan and that state bid law has been complied with. Submission of the final costs certification shall be made to the Finance Office no later than 120 days after acceptance of the final project within the phase and receipt of warranty surety, if required.

SECTION 6. It is understood by the parties that the boundaries of Tax Increment District Seventy-three may overlap the boundaries of other tax increment districts. Any increments generated from areas within overlapping districts will be used to pay for the improvements in the districts based on the chronological order in which the districts were

created. Only after the disbursements required of the City in the project plans or developer's agreements for any previously created districts have been satisfied, will the City have a duty to disburse funds under this agreement.

SECTION 7. All positive tax increment payments for Tax Increment District Number Seventy-three shall, upon receipt by the City, be deposited in a special fund to be known as the "Tax Increment District Number Seventy-three Fund," hereinafter referred to as the "Fund." Subject to Sections 2, 5, 6, 9 and 10 of this agreement and the limitation that at no time shall the cumulative total of payments made from the fund exceed the lesser of the total amount of disbursements certified pursuant to Section 5 of this agreement or the total of the estimated project costs set forth in Section 1 of this agreement and the Tax Increment District Number Seventy-three Project Plan as well as any other limitations contained herein, the City shall, within thirty (30) days after the receipt of each tax increment payment from the Treasurer of Pennington County, disburse the total amount in the Fund to the Developer or their designee.

SECTION 8. It is contemplated by the parties the Developer may assign its interest under this agreement as security for the note or loan agreement, or other financing described in Section 4 hereof. It is understood and agreed, by and between the parties, that any such assignment shall be in writing and that if the City shall make disbursement pursuant to such assignment that it shall, to the extent of such disbursement, relieve the City of the obligations to make such disbursement to Developer. Any assignee shall agree to be bound by the terms and conditions contained in this agreement. The City shall have the right to refuse any subsequent assignment if it will result in an increase in the amount of interest being paid to a financial institution, even if the interest rate being charged by the new lender complies with the terms of Section 4.

SECTION 9. It is specifically a condition of this agreement and a condition of the City's obligation to pay, that all sums payable shall be limited to the proceeds of the positive tax increment from Tax Increment District Number Seventy-three received into the "Fund" specified in Section 7 hereof. The obligation of the City to pay pursuant to this agreement does not constitute a general indebtedness of the City or a charge against the City's general taxing power. The provisions of SDCL 11-9-36 are specifically incorporated herein by reference. It is also specifically agreed that the City has made no representation that the proceeds from such fund shall be sufficient to retire the indebtedness incurred by Developer under Sections 4 and 8 hereof. The parties further acknowledge that SDCL 11-9-25 limits the duration of allocability of the positive tax increment payments to the fund created by Section 7 hereof. The provisions of SDCL 11-9-25 are specifically incorporated herein by this reference.

SECTION 10. Selection of contractors for the construction of the public improvements described in Section 1 shall comply with all provisions of South Dakota law regarding the expenditure of public funds contained in Chapters 5-18A, 5-18B, 5-18C, and 5-18D of the South Dakota Codified Laws. Upon a request by the City, the Developer shall provide documentation demonstrating that it has complied with these Chapters.

SECTION 11. Developer agrees to defend, indemnify and hold harmless the City of Rapid City from obligations or liability, including reasonable attorney's fees, arising out of this agreement or the construction of the improvements contemplated by the Tax Increment District Seventy-three Project Plan. The Developer shall maintain a policy of liability insurance, acceptable to the City, with liability limits of at least one million dollars (\$1,000,000.00) that names the City of Rapid City as an additional insured. Such a policy shall remain in effect until the City accepts the improvements.

SECTION 12. Developer agrees to promptly satisfy or bond over any and all mechanic's liens or material man's liens that arise as a result of this project. This provision shall not prevent Developer from subsequently seeking compensation from subcontractors or others who may be responsible for such liens or for such payment.

SECTION 13. The parties acknowledge that the public improvements contemplated in Section 1 of this agreement could not feasibly be constructed without the creation of this tax increment district and the use of private financing being secured by the Developer. Accordingly, the mutual covenants and obligations hereunder shall constitute good and sufficient consideration for the execution and performance of this agreement.

SECTION 14. This document, the Project Plan for Tax Increment District Seventy-three, and the Master Development Agreement and the Assignment and Novation Agreement, including any addendums or modifications thereto constitute the entire agreement of the parties with respect to the payment of funds from Tax Increment District Seventy-three. No other promises or consideration form a part of this agreement. All prior discussions and negotiations are merged into these documents or intentionally omitted. This agreement may only be amended or modified in writing by mutual agreement of the parties.

SECTION 15. This agreement is intended solely for the benefit of the parties hereto and shall not be enforceable by, or create any claim of right or right of action, in favor of any other party. Except as allowed under Sections 4 and 8 of this agreement, the rights and obligations of the parties hereunder shall not be assigned or transferred by either party without the express written consent of the other. Subject to that restriction, this agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors, assigns and legal representatives.

SECTION 16. Failure of a party to insist upon adherence to any term of this agreement on any occasion shall not be considered a waiver, or deprive that party of the right thereafter to insist upon adherence to that term, or any other term of this agreement.

SECTION 17. If one or more provisions of this agreement is declared invalid for any reason whatsoever by any competent court, such invalidity shall not affect any other section(s) or provision of this agreement if they can be given effect without the invalid section(s) or provisions.

SECTION 18. This agreement shall be deemed to be prepared jointly by the parties hereto and neither shall be deemed to be its sole author. In the event of any claim of ambiguity, no provision shall thereby be construed against either party.

SECTION 19. This agreement shall be construed and the parties' actions governed by the laws of the State of South Dakota. The Circuit Court of Pennington County shall be the sole venue for any disputes arising under this agreement.

Dated this \_\_\_\_ day of \_\_\_\_\_, 2012.

CITY OF RAPID CITY

\_\_\_\_\_  
Sam Kooiker, Mayor

ATTEST:

\_\_\_\_\_  
Finance Officer  
(SEAL)

State of South Dakota            )  
  ss.  
County of Pennington            )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2012 before me, the undersigned officer, personally appeared Sam Kooiker and Pauline Sumption, who acknowledged themselves to be the Mayor and Finance Officer, respectively, of the City of Rapid City, a municipal corporation, and that they, as such Mayor and Finance Officer, being duly authorized to do so, executed the foregoing instrument for the purposes herein contained by signing the name of the City of Rapid City by themselves as Mayor and Finance Officer.

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

\_\_\_\_\_  
Notary Public, South Dakota

My Commission Expires:

(SEAL)

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

PRESIDENT'S PLAZA, L.L.C

\_\_\_\_\_  
Hani Shafi, Member

\_\_\_\_\_  
Pat Hall, Member

State of South Dakota        )  
  ss.  
County of Pennington        )

On this the \_\_\_\_\_ day of \_\_\_\_\_, 2012 before me, the undersigned officer personally appeared \_\_\_\_\_, who acknowledged himself to be a member of President's Plaza, L.L.C., and that as such, being duly authorized to do so, executed the foregoing instrument for the purposes herein contained.

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

\_\_\_\_\_  
Notary Public, \_\_\_\_\_

My Commission Expires:

(SEAL)

State of South Dakota        )  
  ss.  
County of Pennington        )

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\_\_\_\_\_  
Notary Public, \_\_\_\_\_

My Commission Expires:

(SEAL)