

After recording return to:
City of Billings
Community Development Division
P.O. Box 1178
Billings, MT 59103

BUSINESS CONSORTIUM PROJECT
DEVELOPMENT AGREEMENT

between

City of Billings
A Montana Municipal Corporation
whose address is
P.O. Box 1178 Billings, Montana 59103
the "City"

and

Rimrock Foundation
A Non-Profit Organization
whose address is
1231 North 29th Street, Billings, Montana 59101,
the "Owner / Developer", hereafter referred to as the "Developer"

DATE: _____

WHEREAS, the Developer desires to work with the City of Billings to develop new affordable rental housing on property in the City of Billings, Yellowstone County, Montana commonly known as: **116 South 30th Street**, and legally described as:

***S03, T01 S, R26 E, BLOCK 192, Lot 005, LTS 5 & 6 BLK 192
BILLINGS ORIGINAL TOWN, according to the official plat thereof on
file and on record in the office of the Clerk and Recorder of said
County; hereafter referred to as the "property"; and***

WHEREAS the City has concurrently received notification of Economic Development Initiative funding via the Consolidated Appropriations Act, 2010 (PL 111-117) as provided through the U.S. Department of Housing and Urban Development;

WHEREBY the City will receive and administer these federal moneys to provide financing, in part, for an acquisition / rehabilitation project to be undertaken by the Developer;

WHEREAS, the Developer is desirous of obtaining such financing to participate in the Business Consortium Project in Billings and is willing to assume obligations to the City under the above stated contracts on the terms and conditions, as provided herein; AND

WHEREAS, the Developer desires to acquire and rehabilitate affordable rental housing to house the homeless, and the Developer desires to use \$200,000 in federal funds from sources noted above for acquisition and rehabilitation.

WITNESSETH THAT the City and the Developer mutually agree as follows:

A. PURPOSE

The purpose of this written Agreement is to ensure compliance with the Economic Development Initiative funding via the Consolidated Appropriations Act, 2010 (PL 111-

117) provided through the U.S. Department of Housing and Urban Development (HUD). Both sources provide funding for this project which has been approved by the City.

B. DOCUMENTS INCORPORATED INTO THIS AGREEMENT BY REFERENCE BUT NOT ATTACHED HERETO AND ACCEPTANCE OF STATE AND FEDERAL REQUIREMENTS

The Developer, a sub-recipient of state and federal funds, agrees to comply with all appropriate federal, state, and local laws applicable to the funding awarded to complete approved activities undertaken through this Agreement, including:

1. All program requirements which regulate and restrict the use of state and federal funds under the U.S. Department of Housing and Urban Development. This includes the regulations issued there under, now or hereafter, including but not limited to 24 CFR, and the regulations, policies, guidelines, and requirements as they relate to the application, acceptance, and use of state and federal funds for this program;
2. Developer's project application statements included in a response to the City's Request for Proposals on October 1, 2010. The response included: certifications of compliance; organization identification and mission; capacity and experience; project design and soundness of approach; financial structure and project implementation;
3. Federal Office of Management and Budget (OMB) Circular A-122, "Cost principles Non-Profit Organizations" and the provisions of OMB Circular A-133, "Audits of States, Local Governments, and Non-Profit Organizations" concerning the use of state and federal funds provided under this Agreement;
4. Montana Human Rights Act (MCA § 49-2-101 (2002) et seq.);
5. Governmental Code of Fair Practices (MCA § 49-3-101 (2002) et seq.);
6. Federal Civil Rights Act of 1964 (42 USC 2000d, et seq.);
7. Federal Age Discrimination Act of 1975 (42 USC 6101 et seq.);
8. Uniform Relocation Act of 1973;
9. Section 504 of the Federal Rehabilitation Act of 1973 (29 USC 794);
10. Federal Americans with Disabilities Act of 1990 (42 USC 12101, et seq.);
11. Federal Labor Standards set forth in 24 CFR 570-605;
12. Environmental Review Procedures as outlined in 24 CFR Part 58 including historic review, flood insurance, historic properties, architectural barriers and environmental impacts;
13. Federal Energy Policy and Conservation Act;
14. Property purchased with federal funding must be purchased, managed and disposed of in accordance with pertinent provisions at 45 CFR § 74 and § 92; AND
15. Programmatic Agreement between the City, the Yellowstone Historic Preservation Board, the State Historic Preservation Office and the Advisory Council on Historic Preservation.

C. ADDITIONAL PROGRAM REQUIREMENTS

1. The Developer will comply with all applicable parts and requirements in state and federal laws, regulations, administrative directives and procedures; and local ordinances and resolutions.
2. The Developer agrees to the following:
 - a. **Project Schedule:** The project's planning began in 2010. Acquisition is expected to occur by January 2010 and rehabilitation is anticipated to begin shortly thereafter on a unit-by-unit basis. Construction will be completed including weather dependent items by April 2010; unless an extension is granted by the City.
 - b. **Project Budget:** The total project budget is \$200,000. Current and complete Sources and Uses are on file with the City and the Developer. The Developer may not modify this budget without having requested and received the City's written approval of the adjustment. Modifications to the budget will be considered a violation of the contract and are grounds for termination at any point without consideration for performance or compensation.

- c. **Project Scope:** The major components of the project include: the Developer's desire for acquisition and rehabilitation of two (2) units of affordable, rental housing for low-income households to be located at **116 South 30th Street, Billings, Montana 59101.**

The project includes two (2) apartments for homeless individuals below 80% of the current Area Median Income.

One unit will conform to Section 504 of the Rehabilitation Act of 1973 the needs of those with disabilities. Housing constructed will meet local building codes and will meet housing property standards as required in 24 CFR 92.251 for the duration of the affordability period.

- d. **Project Participants:** Individuals / households placed in residency for this project must be qualified as "homeless" according to the following definition in addition to residency requirements as established by the Developer for program participation:

- i. An individual / household lacking a fixed, regular, and adequate nighttime residence; and
- ii. An individual / household whose primary nighttime residence is:
 - a) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters, and transitional housing for the mentally ill);
 - b) An institution that provides a temporary residence for individuals intended to be institutionalized; or
 - c) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

- e. **Median Income Level:** The City & Developer agree that 100% of the units to be acquired / rehabilitated will be occupied by households at 80% or less of current Area Median Income. In the event that less than 100% of the units are rented to households at or below 80% of the area median income at any given time, this imbalance shall be corrected by assuring future units rented in the project will be rented to a household at or below 80% of area median income until the imbalance is corrected and the 100% benefit level is achieved.

- f. **Fixed or Floating Units:** All of the units in this Agreement are state and federally-assisted and are fixed, with an exception for a unit that may be reserved to accommodate an on-site service provider.

- g. **Project Monitoring during the Period of Affordability:** The period of affordability for the project begins the date the project is completed as per the date of full lease-up continues throughout the seven (7) year affordability period.

Information necessary for completing activity reporting include: finalized project budget; occupant demographic and income data; information on unit configuration; rents; and rental assistance. Other mandatory monitoring requirements include (but are not limited to):

- i. Demographic and rental unit information on initial occupants;
- ii. Annual reports on current occupants including demographic and rental unit information; and
- iii. Information pertaining to the level and cost of services the occupant / household for one year prior to placement and one year post placement.

The Developer will provide initial rent-up information on occupants and units to the City within thirty (30) days of initial occupancy and annually thereafter. The City's monitoring responsibilities include (but are not limited to):

- i. On-site monitoring reviews of the project at least every three (3) years as required for a project of one to four (1 to 4) total units; and
- ii. Source documentation monitoring for occupant income and eligibility verification at least every six (6) years from the date of initial lease-up.

3. **Environmental Review and Historic Preservation:** The Developer will carry out each activity in compliance with all federal laws and regulations described in 24 CFR, Part 92. The Developer does not assume the City's responsibility for the environmental

review which has been completed by the City prior to acquisition. The Developer will comply with historic preservation guidelines in accordance with the approved Programmatic Agreement between the City, the Yellowstone Historic Preservation Board, and State Historic Preservation Office.

4. **Uniform Relocation Act:** The Developer will be subject to compliance with the federal Uniform Relocation Act and all related laws and regulations, be solely responsible for the cost to comply with those requirements, and be subject to termination of this Agreement without cause other than failure to comply with federal regulation. Further, the Developer will maintain the obligation to bear all costs associated with relocation resulting from activities undertaken with state and federal funds including displacement and relocation.
5. **Insurance Coverage:** The Developer shall secure and maintain such insurance policies, including those set forth below, as will protect itself, its subcontractors and, unless otherwise specified, the City from all claims for bodily injuries, death or property damage which may arise under this Agreement; whether the acts were made by the City or Developer or by any subcontractor or anyone employed by the Developer directly or indirectly. The following insurance policies are required:
 - a. Commercial General Liability in an amount not less than \$1.5 million per occurrence for injuries, including accidental death to any one person;
 - b. Builder's Risk Insurance in an amount not less than the completed value of the property (appraised value plus costs of rehabilitation);
 - c. The City shall be listed as an additional insured on the policy during the entire period of affordability (**7 years**).

Insurance certificates shall be filed with the City giving satisfactory evidence of insurance as stipulated above **at the time** the Agreement is signed. The Public Liability Insurance certificate shall be maintained during the life of the Agreement. The Builders Risk Insurance shall be secured prior to initiating rehabilitation on the first unit.

All insurance certificates shall name the City as an insured party and contain the following language, "The Company agrees that it will give the City of Billings, Montana ten (10) days prior written notice of its intent to cancel or materially change the described policy." This language, however, if accompanied by a disclaimer or any other language, which negates company responsibility for failing to provide said notice, will not be acceptable.

The insurer and insurance documents must be satisfactory to the City Attorney for the City of Billings. Further, the Developer will assure all subcontractors performing work on the project maintain public liability, property, and casualty insurance and stationary workers compensation insurance coverage in compliance with State Law.

6. **Construction Contracts:** The Developer agrees to deny participation in construction contracts by ineligible, debarred or suspended persons or entities. The Developer will provide the City with the names of contractors and subcontractors prior to entering into contracts. The Developer will utilize lead-safe contractors as required.
7. **Non-Discrimination:** The Developer will not discriminate against any contractor, subcontractor, or rental applicant due to race, color, creed, religion, ancestry, national origin, sex, disability, or other handicap, age, marital / familial status, or status with regard to public assistance. The Developer will take affirmative action to ensure all employment practices are free from such discrimination. The Developer agrees to comply with the non-discrimination in employment and Contracting opportunities laws, regulations, and executive orders referenced in: 24 CFR 570.607 and as revised by Executive Order 13279, 11246 and 11375; 24 CFR 92.350; 41 CFR Part 60; and MCA § 49-3-207 (2002) et seq.
8. **Lead-Based Paint:** The Developer agrees that any construction or rehabilitation of residential structures with assistance provided under this Agreement shall be subject to HUD Lead-Based Paint Regulations at 24 CFR Part 35 in addition to 24 CFR 92.355 and 570.608, which results in the prohibition of the use of lead-based paint for this project. The per-unit subsidy for acquisition and rehabilitation is approximately **\$15,750**. The Developer agrees to use lead safe work and abatement practices as required, and will utilize certified contractors in accordance with HUD requirements, and will not utilize lead-based paint in new construction projects.

9. **Religious Organization:** The Developer will follow the provisions governing the restriction on the use of federal funds by religious organizations, as contained in 24 CFR 92.257.
10. **Political Activities:** None of the funds, materials, property or services provided directly or indirectly under this Agreement shall be used for any partisan political activities or to further the election or defeat of any candidate for public office.
11. **Drug-Free Work Place:** The Developer certifies that it will provide a drug-free work place.
12. **Subcontract Compliance:** The Developer agrees that all subcontracts entered into by the Developer for the completion of the Project described herein will contain provisions requiring compliance with all applicable local, state and federal requirements. These contract provisions are to be included in all subcontracts.
13. **Repayment to the City:** The Developer expressly agrees to repay to the City any funds paid on behalf on the Developer or its subcontractors that are expended in violation of the terms of this Agreement or local, state and federal statutes and regulations governing the use of state and federal funding, or if for some reason the project is unable to move forward in within the time frame set forth in this Agreement.

Affordability requirements for the project will be met, including regulations outlined for the affordability of rental housing units as per 24 CFR 92.252. The Developer expressly agrees to repay the City all funds paid on behalf of the Developer or its subcontractors if the housing constructed does not meet the affordability requirements for the specified period of affordability (24 CFR 92.504(c)(3)(ii)).

D. SURVIVAL OF CERTAIN CONTRACT TERMS

Notwithstanding anything herein to the contrary, the parties understand and agree that all terms and conditions of this Agreement and attachments hereto which may require continued performance or compliance beyond the termination date of this Agreement shall survive such termination date and shall be enforceable by City as provided herein in the event of such failure to perform or comply by the Developer or its subcontractors.

E. COMPENSATION

The City of Billings shall **reimburse** the Developer for all eligible project costs in the total amount of \$200,000 for acquisition and rehabilitation costs. The City's obligation to make periodic or final payment to the Developer shall be conditioned upon the City's receipt of grant funds sufficient to make such payment. Final compensation will be made only when the Developer is in full compliance with this Agreement.

F. PAYMENT METHOD

Payment is made on a **reimbursement basis** of actual and proper expenditures and shall be made in accordance with this Agreement between City and Developer. Payment requests submitted by the Developer to the City must include a project narrative, receipts and documentation of expenditure. Payments for The City may withhold any payment if the Developer has failed to comply with program objectives, contractual terms, or reporting requirements. The City may withhold payment of the final five percent (5%) of the total award amount until the Developer has submitted and the City has accepted all required financial and performance report information required pursuant to either the Grant or City requirements.

G. INDEPENDENT DEVELOPER

The Developer shall be considered independent from the City, and may not be the agent or employee of City, shall have no authorization, express, implied, or apparent, to bind the City to any Agreements, settlements, liability, or understanding except as expressly set forth herein.

The Developer must maintain appropriate workers compensation and unemployment insurance coverage. The Developer is solely responsible for and must meet all labor and tax law requirements pertaining to employment and contracting services, inclusive of insurance premiums, tax deductions, tax withholding, overtime wages and other employment obligations that may be legally required with respect to the Developer's organization.

H. PERSONNEL

The Developer represents that it has, or shall secure, at its own expense, all personnel required in performing the services under this Development Agreement. All of the services required hereunder shall be performed by the Developer, or under his/her supervision, and all personnel engaged in the work shall be fully qualified and shall be eligible under the law to perform such services. Where the State or local public jurisdictions require licensure for the provision of services provided hereunder, the Developer and any subcontractors shall be properly licensed. The Developer will provide at the time of this Agreement; proof of performance and payment bonds; Commercial General Liability Insurance in the amount of \$1.5 Million per occurrence and workers compensation insurance carried by any subcontractor who contracts directly with the Developer for the construction services related to this Agreement as outlined herein. Other professional services subcontracted for by the Developer will provide proof of insurance as required by Montana Law.

I. TIME OF PERFORMANCE

This Agreement shall become effective upon its execution. The Project shall commence as soon as practicable after the execution of this Agreement and shall be undertaken and performed in accordance with the schedule set forth in the Development Agreement between the City and the Developer. The Developer agrees that time is of the essence in the performance of its obligations under this Agreement, and that completion of the project shall occur no later than the termination date or the date set for the in this Agreement.

J. TERMINATION DATE

This Agreement shall terminate seven (7) years for the entire period of affordability, after the date upon which the project was fully leased to qualified tenants, in addition to authorized extensions as set forth in the Agreement between the City and the Developer.

K. LIAISON AND NOTICE

BRENDA BECKETT, COMMUNITY DEVELOPMENT MANAGER is the City's liaison with the Developer.

MONA SUMNER, CHIEF OPERATING OFFICER is the Developer's liaison with the City.

Notice will be sufficient if given in writing and mailed to the parties' liaison at the addresses described above.

L. OWNERSHIP AND PUBLICATION OF MATERIALS

All reports, information, data, and other materials related to the project and prepared by any subcontractor pursuant to this Agreement are to be the property of the Developer and the City, which each have the nonexclusive and unrestricted authority to release, publish or otherwise use in whole or in part, information relating to it. No material produced in whole or in part under this Agreement may be copyrighted or patented in the United States or in any other country without the prior written permission of the City and the Developer.

M. ACCESS TO RECORDS

The Developer will supply to the City copies of all current records, including, but not limited to: contracts; approved invoices and lien releases; project budgets; cash flow statements; annual audits; and any and all financial records which impact the performance of the Developer under the terms of this Agreement.

The Developer may, at the City's discretion, be considered in breach of this Agreement by failing to provide any and all requested documentation in a timely manner. Failure to provide timely access to records is grounds for termination of this Agreement and non-reimbursement for expenditures. The City will retain records of the Developer's performance under this Agreement and will allow access to these records at any time during normal business hours by the Developer, HUD, the State of Montana and the Comptroller General. These records will be kept at the Community Development Office, 510 N. Broadway, Billings, Montana.

Project Records Required:

1. Documentation that the project meets applicable property standards for acquisition / rehabilitation activities;

2. For each household renting a unit - a copy of the rental application, income verification, and lease agreement and subsequent annual income verifications;
3. Immediate written notification of any pending legal action which names the Developer and the real property assets covered under this Agreement.

The records demonstrating compliance with project requirements that apply for the period of affordability must be retained for at least five (5) years after the required period of affordability. If any litigation, claim negotiation, audit or other action has been commenced before the expiration of the regular five-year (5) period, the records must be retained until completion of the action and resolution of all issues which arise from it, or until the end of the regular period, whichever is later.

Access to the records described above and all other documentation relating to the program is governed by all applicable state and federal laws as they pertain to disclosure of information to the public and to the individual's right of privacy.

N. PROGRESS REPORTING

The Developer will promptly submit status reports on project progress at the request of, and in the format prescribed by, the City of Billings.

O. AVOIDANCE OF CONFLICT OF INTEREST

The Developer will comply with the provisions of 24 CFR § 92.356; 24 CFR Part 84; and with § 2-2-125, 2-2-201, 7-3-4367, 7-5-2106, and 7-5-4109, MCA, as applicable, regarding the avoidance of conflict of interest.

No officer, employee, or agent of the Developer or immediate relative (spouse, parent, sibling, and child) shall be an investor, officer, employee or agent of the City, nor shall any officer, employee or agent of the Developer receive any compensation from the Developer during the term of this Agreement outside the specified and approved project costs for development.

P. MODIFICATION AND ASSIGNABILITY OF AGREEMENT

This Agreement contains the entire agreement between the parties, and no statements, promises, or inducements made by either party, or agents of either party who are not contained in or authorized by this written Agreement, are valid or binding. This Agreement may not be enlarged, modified, or altered except upon written agreement. This Agreement does not imply any continuing commitment by the City of Billings beyond the termination date noted herein.

The City and Developer accept responsibility for adherence to the terms of this Agreement by contractor, subcontractor or sub-recipient entities and by its agents, if any, to which it delegates authority to carry out portions hereof. For the purposes of this Agreement, legal actions pending (or in process) are considered a pending modification of the written agreement and require a written notice to the City as soon as the written agreement becomes part or party to a legal civil or criminal action.

Modification or assignment of this Agreement without prior written notice to the City will be grounds for termination and loss of unexpended funds at the City's discretion. The City reserves the right to seek damages if the termination of this written Agreement results in the loss or recapture of funds from the City by state or federal sources.

Q. CONSTRUCTION AND VENUE

This Agreement will be construed under and governed by the laws of the State of Montana. In the event of litigation concerning it, venue is in the District Court of the Thirteenth Judicial District in and for the County of Yellowstone, State of Montana.

R. INDEMNIFICATION

The Developer waives any all claims and recourse against the City, including the right of contribution for loss or damage to persons or property arising from, growing out of, or in any way connected with or incidental to the Developer's or any contractor, subcontractor or sub-recipient's performance of this Agreement.

Further, Developer will indemnify, hold harmless, and defend the City against any and all claims, demands, damages, costs, expenses, or liability arising out of the Developer or any contractor, subcontractor or sub-recipient's performance of this Agreement. In the event the City of Billings is named as a co-defendant in any action relating to activities to be performed by the Developer or sub-recipient under this Agreement, the Developer will immediately notify the City of such fact in writing.

In addition, the City will indemnify, hold harmless, and defend the Developer, its officers, agents and employees against any and all losses, claims, demands, damages, costs, expenses, or liability arising out of the City's performance of this Agreement or in any way arising or resulting from any intentional or negligent act on the part of the City or its agents or employees or which result in personal injury or real or personal property damage to any person or entity including the Developer. In the event that the Developer is named as a co-defendant in any action relating to activities to be performed by the City or Developer under this Agreement, the City will immediately notify the Developer of such fact in writing.

S. TERMINATION OF AGREEMENT

This Agreement may be terminated as follows and is subject to the following provisions in accordance with 24 CFR 85.43, suspension or termination may occur if the Developer materially fails to comply with any term of this Agreement (24 CFR 92.504(C)(2)(ix)).

Termination Due to Loss of Funding: The parties hereto expressly recognize that Developer is to be paid, reimbursed, or otherwise compensated with state and federal funds provided to City under contracts outlined in this Agreement for the purpose of contracting for the services provided for herein; and therefore, Developer expressly understands and agrees that all its rights, demands, and claims to compensation arising under this contract are contingent upon receipt of such funds by City. In the event that such funds or any part thereof are not received by City, the City may immediately terminate or amend this Agreement.

Termination for Cause: If, through any cause, the Developer shall fail to fulfill in a timely and proper manner their obligations under this Agreement, or if the Developer shall violate any of the covenants, agreements, or stipulations of this Agreement, the City shall thereupon have the right to terminate this Agreement for cause by giving written notice to the Developer of such termination and specifying the effective date thereof, at least five (5) days before the effective date of such termination. It is understood that the Developer and City representatives shall enter into negotiations in an attempt to reach a solution mutually acceptable to both parties within ten (10) days of notification of termination, if the City shall so request in writing. If no agreement is reached by the City and Developer then the matter will be referred to HUD for resolution. In any event, the City may terminate the Agreement to fund an activity without cause or recourse from the Developer, its agents or subcontractors.

Notwithstanding the above, the Developer shall not be relieved of liability to the City for any damages sustained by the City by virtue of any breach of contract by the Developer, and the City may withhold any payment to the Developer for the purpose of setoff until such time as the exact amount of damages due to the City from the Developer is determined.

Return of Material: In event of termination, all finished or unfinished documents, data studies, surveys, drawings, maps, models, photographs, and reports or other material prepared by the Developer under this Agreement, shall, at the option of the City, become the City's property, and City shall be entitled to receive just and equitable compensation for any satisfactory work completed on such documents and other materials.

Remedies: Where either party violates or breaches contract terms, the other party, in its discretion, may, in addition to terminating this Agreement, institute such administrative, contractual, legal or equitable remedies available as may be appropriate. In such event, the party found in violation of the Agreement shall pay the other party's costs and reasonable attorney's fees incurred thereby.

T. CONTRACT SUSPENSION

If the Developer fails to comply with any contractual provision, the City may, after notice to the Developer, suspend the Agreement and withhold further payments to prohibit the Developer from incurring additional obligations of contractual funds or demand repayment of funds expended, pending corrective action by the City or a decision to terminate in

accordance with provisions herein. The City may determine to allow such necessary and proper costs which the Developer could not reasonably avoid during the period of suspension, provided such costs were necessary and reasonable for the conduct of the project.

U. GRANT CONTROLS

Notwithstanding any provision herein to the contrary, the performance and administration of this Agreement shall be subject to the applicable provisions of the City's contracts with the U.S. Department of Housing and Urban Development. Accordingly, the Developer hereby assumes all obligations under the Contract as a condition to Developer's obligation to perform under this Agreement.

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