

KIBLER & KIRCH
DEVELOPMENT AGREEMENT

This Development Agreement ("Agreement") is entered into as of _____, 2020 by and between the Downtown Billings Partnership, Inc., an I.R.C. S501(c)(4) Montana nonprofit corporation ("DBP"), The City of Billings, Montana, a municipality of the State of Montana ("City"), and Kibler and Kirch, LLC, a Montana limited liability company ("Developer"). DBP, the City and Developer shall each be referred to herein as a "party" and shall collectively be referred to as the "parties."

RECITALS

WHEREAS, DBP is the entity responsible for administration of Tax Increment Financing ("TIF") funds for the City; and

WHEREAS, on or about October 15, 2020, Developer submitted a Funding Application (defined below) to DBP requesting a TIF grant for a project to renovate, rehab, and remodel property located at 104 North Broadway in downtown Billings (the "Property" as further defined below); and

WHEREAS, on or about November 20, 2020, DBP's Board of Directors approved the Application for a TIF grant; and

WHEREAS, on December 14, 2020, the City of Billings City Council approved a reimbursement grant using TIF funds to Developer in an amount of up to \$79,940 (the "TIF Grant") to be dedicated to qualified expenditures for the Project (defined below) and to be disbursed as described in this Agreement; and

WHEREAS, the parties wish to enter into a development agreement, in accordance with DBP's TIF Funding Criteria (defined below), to establish the terms and conditions under which DBP will allocate the TIF Grant funds to Developer from the City in accordance with the DBP agreement with the City regarding urban renewal in Downtown Billings,

NOW, THEREFORE, the parties agree as follows:

SECTION 1
SUBJECT OF AGREEMENT AND DEFINITIONS

1.1 Effect of Recitals. The foregoing Recitals are true and correct and are incorporated into the terms and conditions of this Agreement.

1.2 Purpose of Agreement. The purpose of this Agreement is to set forth the terms and conditions of the TIF Grant to Developer to effectuate the urban renewal project for certain real property located at 104 North Broadway in Billings, Montana, and legally described on the attached Exhibit A (the "Property"). This Project will eliminate blight and compliment and further the objectives of the Expanded North 27th Street Urban Renewal District and Urban Renewal Plan.

1.3 The Funding Application. The DBP and the City have approved the TIF Grant based on Developer's Downtown Tax Increment Financing Application attached hereto as Exhibit B ("Funding Application"), subject to the terms and conditions of this Agreement. The Funding Application includes a preliminary estimated cost of construction of Developer's Improvements (the "Preliminary Developer's Budget")

1.4 TIF Grant Funding Criteria. The term "TIF Funding Criteria" shall mean the Tax Increment Financial Assistance Program criteria for urban renewal projects in the Expanded North 27" Street Urban Renewal District as set forth in the attached Exhibit C.

1.5 Developer's Improvements. The term "Developer's Improvements" shall mean the improvements described on Exhibit B to be constructed by Developer on the Property pursuant to this Agreement and as described in Section 5.

1.6 Conceptual Design Drawings. The term "Conceptual Design Drawings" shall mean the conceptual preliminary depictions of the Developer's Improvements attached hereto as Exhibit B.

1.7 Project. The term "Project" shall mean the Property as improved by the Developer's Improvements.

1.8 Definitive Documents. The term "Definitive Documents" shall mean this Agreement and all Exhibits attached or to be attached hereto.

SECTION 2 PROPERTY

2.1 Ownership. The Property, described on Exhibit A, is currently owned by Stapleton Property Investment, LLC.

SECTION 3 CONDITIONS PRECEDENT

3.1 Conditions Precedent. The DBP's and the City's obligation to be bound by this Agreement with Developer is subject to satisfaction or written waiver of each of the following conditions to the reasonable satisfaction of DBP ("Conditions Precedent"):

- a) Developer has presented DBP proof of ownership of the Property by proof of title insurance reflecting Developer as the fee owner of the Property, subject only to liens and encumbrances satisfactory to DBP.
- b) Developer has obtained financing and provided the DBP with proof of financing in the form of commitment letters or loan documents, for the construction of Developer's Improvements in accordance with the Funding Application within the time period set forth in the Performance Schedule (as defined in Section 6).

- c) Developer has prepared and submitted a detailed budget setting forth the final estimated cost of construction of Developer's Improvements ("Developer's Budget"). When completed, the Developer's Budget will be made a part of this Agreement and will be appended as Exhibit E.
- d) Developer has prepared and submitted final design drawings ("Design Drawings") and construction documents for the Developer's Improvements (collectively, the "Final Plans") in accordance with the terms of this Agreement and the Final Plans have been reviewed and approved by DBP and the City and the estimated cost of the approved design is within Developer's Budget. When completed and approved, the Final Plans will be made a part of this Agreement and will be attached as Exhibit F.
- e) Developer has provided DBP with proof of zoning compliance and approval by any necessary governmental entities.
- f) Developer has executed the Agreement no later than 90 days following the City Council's approval.

3.2 Satisfaction of Conditions. DBP and DBP's representatives, agents and consultants will work with the Developer to obtain satisfaction of the Conditions Precedent.

3.3 Termination for Failure of Conditions. If the Conditions Precedent are not satisfied or waived within 90 days of the date of this Agreement, then any party may terminate the Definitive Documents by written notice to the others and upon such termination the parties shall have no further liability to one another, however, Developer shall remain responsible for indemnifying DBP and the City in accordance with Section 5.12.

SECTION 4: GRANT AND RELEASE OF FUNDS

4.1 Use of TIF Grant Funds. The TIF Grant funds which are the subject of this Agreement shall be used only for urban renewal activities, including the renovation and rehabilitation of the Property, in accordance with the Definitive Documents and the Urban Renewal Law of the State of Montana, §§7-15-420l., et seq., Mont. Code Ann.

4.2 Grant of Funds. City, as recommended by DBP, agrees to grant to Developer the TIF Grant in an amount of up to \$79,940 from funds in the City's Fund 203 account, release of which shall be conditioned upon satisfaction of the conditions precedent set forth in Section 3.1 above, the conditions set forth in this Section 4, and the Developer's obligations, covenants and warranties set forth in this Agreement and the Definitive Documents.

4.3 Availability of TIF Grant Funds. TIF funds are not available to be encumbered (committed) to the Project by the City until they are received as unencumbered TIF funds.

- a) Subject to the availability of unencumbered TIF funds, City agrees that, starting the January 1st after the Project is complete and occupied, it will encumber TIF funds to reimburse Developer for the Project during the fiscal year following completion of the Project according to the requirements of this Agreement. Reimbursements will not be

greater than \$143,927 during the reimbursement period. The deadline for the reimbursement period to start is July 1, 2022.

(In the event unencumbered TIF funds are not available to the City to meet the foregoing schedule, the City may continue to fully encumber, in its sole discretion, to the Project available unencumbered TIF funds until the full TIF Grant is encumbered to the Project.)

- b) Developer reimbursements shall be limited to only those funds that have been encumbered to Project by the City. Notwithstanding anything to the contrary, the payment of the Developer reimbursements is hereby expressly made subordinate in all respects to any and all bonds issued by the City pursuant to the Resolution No. [20-10878] adopted by the City Council of Billings on [June 22, 2020], as amended and supplemented, and the Development reimbursements are a Subordinate Obligation thereunder.
- c) Reimbursements will be made to Developer as explained in Section 4.2 and restricted to TIF funds that have to date been encumbered to the Project.

4.4 Release of Funds following Project Completion. DBP will release the TIF Grant funds approved by the City to the Developer upon the Developer's completion of Developer's Improvements and the Project, determined as follows:

- a) Developer has substantially completed construction of Developer's Improvements in accordance with the Funding Application, as supplemented by the Budget and Design Drawings, and the deadline set forth in Section 6.
- b) Developer has submitted all paid invoices showing the completion and lien-free status of all expenditures related to this Project and Property, including evidence that all construction liens have been satisfied and/or released.
- c) Project costs shall be paid and proof of payment shall be provided in an amount consistent with the Funding Application, as supplemented by the Budget, and this Agreement.
- d) The Project satisfies the public benefit provisions of the Funding Application and the TIF Funding Criteria.
- e) Developer has received a Certificate of Occupancy from the City for the Project.
- f) Developer has received from DBP a Certificate of Satisfaction as defined in Section 5.8 below.
- g) Reimbursement cannot begin before the January 1st following the completion of the Project, as defined in Sections 3, 4, 5, and 6 of this Agreement.

4.5 Satisfaction of Project Completion Conditions. DBP and DBP's representatives, agents and consultants may assist the Developer to obtain satisfaction of the conditions for completion of the Project set forth in Section 4.4 (where applicable).

4.6 Extent of Commitment. DBP and the City shall have no obligation for any costs associated with the Project which exceed the amount of the TIF Grant funds approved in accordance with this Agreement.

SECTION 5: DEVELOPERS IMPROVEMENTS AND COVENANTS

5.1 Construction of Developer's Improvements. Developer agrees to construct and develop the Developer's Improvements, at its sole cost and expense, consistent with the Design Drawings and the other Definitive Documents.

5.2 Architects and Contractors. Developer will have the right to select its architects, contractor and other subcontractors and consultants in its sole discretion. Developer will require all architects, engineers, or other professional consultants to maintain professional liability insurance in an insurable amount not less than \$1,000,000 combined single limit, covering all professional activities performed by them in connection with the Developer's Improvements. Further, Developer shall require its contractor to maintain broad form commercial general liability insurance in an insurable amount of not less than \$1,000,000 combined single limit, covering all work performed by contractor in connection with the Developer's Improvements. Developer shall demonstrate proof of coverage to DBP upon request by providing a Certificate of Insurance.

5.3 Insurance. Developer shall maintain fire and casualty insurance covering the Project and the Developer's Improvements in an amount commensurate with the replacement cost of the Project during development and construction of the Project and until issuance of the Certificate of Satisfaction. DBP may, in its sole discretion, recommit funds for reconstruction of the Project in the event Developer determines to reconstruct the Project.

5.4 DBP Access. DBP and DBP's representatives, agents and designees will have the right, at reasonable times and upon reasonable notice to the Developer, to enter upon the Property, in connection with inspection of construction of Developer's Improvements. Upon reasonable notice and request, DBP shall have access to all records and contracts pertaining to the Project. Developer shall keep and maintain accounting records for the Project, and shall make the same available to DBP upon request, including but not limited to all purchase orders, invoices, statements, payment documents, and journals and ledgers related to the Project.

5.5 Governmental Permits. Before commencement of construction of Developer's Improvements, Developer shall obtain all necessary land use, building and other governmental permits. Developer shall maintain all necessary land use, building and other governmental permits during construction of the Project.

5.6 Local, State and Federal Laws. Developer shall carry out the construction of the Developer's Improvements in conformity with all applicable local, state and federal laws.

5.7 Prohibition Against Transfer. Prior to the issuance by DBP of the Certificate of Satisfaction, Developer shall not, except as permitted by this Agreement, without the prior approval of DBP, transfer its interest in the Property or the buildings or structures on the Property. Notwithstanding the foregoing, this prohibition shall not apply to:

- a) The transfer of the Property effective after issuance of the Certificate of

Satisfaction; or

- b) Transfers of property involving transactions in place prior to the date of this Agreement; or
- c) The leasing of space in the Developer's Improvements.

5.8 Certificate of Satisfaction. After substantial completion of Developer's Improvements as determined by DBP, DBP shall furnish Developer with a Certificate of Satisfaction of this Agreement upon written request therefore by the Developer, substantially in the form of Exhibit H. Upon issuance of the Certificate of Satisfaction, Developer and the Property shall be fully relieved of all obligations and restrictions under this Agreement, excluding the obligations to indemnify City and DBP in Sections 4.6, 5.12, 5.13 and 5.14. DBP shall not unreasonably withhold, condition or delay the Certificate of Satisfaction. Such Certificate of Satisfaction shall be a conclusive determination of satisfactory completion of the construction of the Developer's Improvements required by this Agreement as to the Property and such Certificate shall so state. No Certificate of Satisfaction shall constitute a Certificate of Occupancy or evidence thereof under the building permit or codes of the City of Billings.

5.9 No Speculation. Developer represents that its interest in the Property is for redevelopment and not for speculation in land holding.

5.10 Environmental History. To the best of Developer's knowledge, the Property does not contain any hazardous substances found in violation of applicable laws and all mandatory requirements of applicable law with respect to environmental hazards or hazardous substances have been complied with by Developer.

5.11 Compliance with Definitive Documents. Developer has received, reviewed, and approved the Definitive Documents and shall be bound by the terms of the Definitive Documents.

5.12 Control/Indemnification. Developer shall have sole control and responsibility for the construction of the Project. Developer will indemnify, defend and hold the DBP, the City, and their directors, officers, officials, employees and agents harmless for, from and against any and all claims, damages, costs, liabilities and losses arising out of or related in any way to the use, condition, construction or development of the Property, the Project, or the Developer's Improvements, including without limitation to any claims for personal injury, property damage, or for liability to any contractor or its subcontractors, agents or employees.

5.13 Taxes/Assessments. Developer shall pay all applicable taxes, special assessments, and other assessments on the Property and the Developer's Improvements, if any, when due.

5.14 No Tax Protest. Developer shall not protest, or attempt in any way to avoid or dispute, any property taxes, special improvement district assessments, and other assessments on the Property for three (3) years from the date on the Certificate of Occupancy, without prior written consent of DBP, which consent shall not be unreasonably withheld. In the event Developer believes that a property tax or other assessment of the Project is unreasonable, it may request DBP's written consent to protest such assessment to the appropriate authority.

SECTION 6:

SCHEDULE OF PERFORMANCE

6.1 Deadline. A Schedule of Performance of construction of Developer's Improvements is attached as Exhibit G and incorporated herein (the "Performance Schedule"). Developer shall proceed expeditiously to complete construction of the Project in accordance with the Performance Schedule. All construction work for the Project shall be completed by the completion date set forth in the Performance Schedule of June 30, 2021. Developer will be excused for delays resulting from the following circumstances: an act of God or public enemy, fire; storm; wind; flood; earthquake; epidemic; explosion; lightning; continuous loss of power of other utilities for more than thirty days; nuclear radiation; geological or archeological condition; quarantine restrictions; riot or public discord; act of terrorism; Criminal damage; the suspension of the national or state banking system due to financial crises; a union strike, unanticipated pre-existing but undiscovered conditions; or appeal of governmental permits.

SECTION 7: WARRANTIES

7.1 Developer Representations and Warranties. Developer Warrants and represents that the information and documentation provided pursuant to Sections 3.1 and 5 are accurate and complete and that Developer will promptly notify DBP of any changes in such information and documentation.

7.2 Joint Representations and Warranties. The following representations and Warranties are made by each party to the others as of the date hereof:

- a) Authority. Each party has the legal power, right and authority to enter into this Agreement and the instruments referenced herein, and to consummate this transaction.
- b) Actions. All requisite action has been taken by each party in connection with the entering into of this Agreement, the instruments referenced herein, and the consummation of this transaction. No further consent of any partner, shareholder, creditor, investor, judicial or administrative body, governmental authority or other party is required.
- c) Due Execution. The individuals executing this Agreement and the instruments referenced herein on behalf of each party and the partners, officers or trustees of each party, if any, have the legal power, right, and actual authority to bind each party to the terms and conditions of those documents.

SECTION 8: DEFAULTS AND REMEDIES

8.1 Default/General. Subject to the extensions of time set forth in Section 6, and subject to the notice and opportunity to cure provisions contained in this Agreement, the failure or delay by any party to perform any term or provision of this Agreement constitutes a default; however, if the defaulting party commences to cure such default within 60 days after receipt of a notice specifying the default, and thereafter diligently prosecutes such cure to completion, then such party shall not be deemed to be in default. The injured party shall give written notice of default to the defaulting party, specifying the default. The injured party may not institute proceedings, whether

judicial or otherwise, against the party in default until 60 days after giving such notice. Any failure or delay by any party in asserting any of its rights or remedies as to any default shall not operate as a waiver of any default or of any rights or remedies or deprive such party of its rights to institute and maintain any actions or proceedings which it may deem necessary to protect, assert or enforce any such rights or remedies.

8.2 Rights and Remedies. Subject to the provisions of Section 8.1 hereof, in addition to its other rights or remedies, if Developer fails to cure a default or withdraws from the Project for any reason, DBP and City shall have no obligation to release grant funds to Developer. If the Developer fails to cure a default, or withdraws from the Project for any reason, after funds have been released for the Project, Developer shall repay City the amount of any funds released to Developer for the Project. Either party may seek any legal or equitable remedy to cure, correct or remedy any default, to recover any damages for any default, or to obtain any other remedy consistent with the purpose of this Agreement in accordance with the terms of this Section 8.

8.3 Rights and Remedies Not Cumulative. Except as otherwise expressly stated in this Agreement, the rights and remedies of the parties are not cumulative, and the exercise by any party remedies provided in this Section 8 shall preclude the exercise by it, at a different time, of any other rights or remedies for the same default.

8.4 Dispute Resolution. In the event a dispute arises, whether due to a default or the interpretation of any term of this Development Agreement, the complaining party shall deliver notice of the matter in dispute to the other party at the address and in the manner provided for in Section 9.1 hereof. Each party shall within 7 calendar days thereafter designate a representative to address the matter, which representatives shall attempt, in good faith, to resolve the disputed matter within 7 calendar days of the last designation of a representative.

In the event the designated representatives are unable, despite their good faith efforts, to timely resolve the disputed matter within fourteen calendar days of the initial notice thereof, then, and in that event, either any party may request in writing that the matter be resolved through informal mediation. Informal mediation must be completed within 14 calendar days of the request.

If the matter remains unresolved after mediation, or if the mediation is not timely completed - either party may demand binding arbitration in accordance with § 8.5. A complaining party who refused or failed to timely participate in the informal mediation (i) may not seek binding arbitration (ii) waives any demand, claim, or relief from the other party, and (iii) releases the other party from the complaining party's demand, claim, or relief.

8.5 Arbitration. In the event of any dispute arising between the parties to this Agreement, and the conditions of § 8.4 have been met, any such dispute shall be submitted to binding arbitration as provided herein. The parties shall select an independent and unbiased arbitrator who is not affiliated directly or indirectly with either party within ten days after any party demands arbitration. If the parties fail to select, or cannot agree upon, an arbitrator within this time, then either party may apply to the District Court of Yellowstone County pursuant to §27-5-211 et seq. of the Montana Uniform Arbitration Act for an order appointing an arbitrator. Such applications may be made at any time after the ten-day period has expired. Upon application to the

court for an arbitrator, the Court shall select a single arbitrator, who shall render his/her decision no later than 60 days after his/her appointment. If the arbitrator requests a hearing prior to rendering his/her decision, such hearing shall be held in Yellowstone County, Montana within 30 days of the arbitrator's appointment. The arbitrator's decision shall be binding on both parties. Each party shall bear its own expenses associated with the arbitration but shall share equally the costs of the arbitrator.

8.6 Authorized mediators/arbitrators. Any formal mediation or arbitration shall select one of the following as the mediator and/or arbitrator unless all are either conflicted or unable to serve: (i) Charles Cashmore (CCashlaw@aol.com); (ii) Russell Fagg (rfagg@icloud.com); (iii) Greg Murphy (greg.murphy10@gmail.com); (iv) Mike Anderson (manderson@alaw.com).

8.7 Waiver. Upon written agreement of both parties, any provision of this Section 8 may be waived. Unless waived, the terms of this Section 8 shall be strictly applicable to any dispute between the parties hereto.

SECTION 9: GENERAL PROVISIONS

9.1 Notices. All notices or other communications required or permitted hereunder must be in writing, and must be personally delivered (including by a professional messenger service) or sent by overnight courier, or sent by registered or certified mail, postage prepaid, return receipt requested to the addresses set forth below. All notices sent by mail will be deemed received 2 (two) days after the date of mailing and all notices sent by other means permitted herein shall be deemed received on the date delivered. Notices will be sent as follows:

Developer: Kibler and Kirch, LLC
Attn: Jeremiah Young
Address: 104 North Broadway
Billings, MT 59101
Telephone: (406) 446-2226
Email: Jeremiah@kiblerandkirch.com

City: The City of Billings, Montana
Attn: Brent Brooks, City Attorney
Address: 20 North 27th Street
Billings, MT 59101
Telephone: (406) 657-8202
Email: BrooksB@ci.billings.mt.us

DBP: Downtown Billings Partnership, Inc.
Attn: Mehmet Casey
Address: 116 N 29th Street Suite A
Billings, MT 59101
Telephone (406) 294-5060

Email: mehmetc@downtownbillings.com

9.2 Nonliability of Officials and Employees. No director, officer, member, official, employee or agent of Developer, DBP or the City shall be personally liable to any party or any successor-in-interest thereto, in the event of any default or breach by any party or for any amount which may become due to any party or its successor, or any obligations under the terms of this Agreement.

9.3 Headings. Any title of the several parts and sections of this Agreement are inserted for convenience or reference only and shall be disregarded in construing or interpreting any of its provisions.

9.4 Time of Essence. Time is of the essence of this Agreement. All obligations of the parties to one another shall be due at the time specified by the Agreement, or as the same may be extended by mutual agreement of the parties in writing.

9.5 Construction/Governing Law, and Venue. The parties and their respective advisors believe that this Agreement is the product of all of their efforts, that it expresses their agreement and that it should not be interpreted in favor of or against any party. The parties further agree that this Agreement will be construed to effectuate the normal and reasonable expectations of sophisticated parties. The parties hereto expressly agree that this Agreement will be governed by, interpreted under, and construed and enforced in accordance with the laws of the State of Montana. Any action in law or equity, or judicial proceeding for the enforcement of this Agreement or any of the provisions contained herein, shall be instituted and maintained only in Thirteenth Judicial District Court for Yellowstone County, Montana.

9.6 Severability. If any clause, sentence or any other portion of the terms and conditions of this Agreement become illegal, null or void for any reason, or held by any court of competent jurisdiction to be so, the remaining portion will remain in full force and effect.

9.7 No Partnership. Neither anything in this Agreement nor any acts of the parties hereto shall be deemed or construed by the parties hereto, or any of them, or by any third person, to create the relationship of principal and agent, or of partnership, or of joint venture, or of any association between any of the parties to this Agreement.

9.8 Government Rights. Except as provided herein, by making this Agreement, DBP and the City are not obligating themselves or any other agency with respect to any discretionary action relating to the development of the Property or development, operation and use of the improvements to be constructed on the Property, including but not limited to, condemnation, comprehensive planning, re-zoning, variances, environmental clearances or any other governmental agency approvals which are or may be required.

9.9 Non-Waivers. No Waiver of any breach of any covenant or provision contained herein will be deemed a Waiver of any preceding or succeeding breach thereof, or of any other covenant or provision contained herein. No extension of time for performance of any obligation or act will be deemed an extension of the time for performance of any other obligation or act except those of the waiving party, which will be extended by a period of time equal to the period of the

delay.

9.10 Entire Agreement/Counterparts. This Agreement, together with the Definitive Documents, integrates all of the terms and conditions mentioned herein or incidental hereto and supersedes all negotiations or previous agreements between the parties or the predecessors in interest with respect to all or any part of the subject matter hereof. This Agreement may be signed by counterparts.

9.11 Successors. This Agreement shall be binding upon and inure the benefit of the parties, their successors and assigns.

DOWNTOWN BILLINGS PARTNERSHIP (“DBP”)

By: _____

Its: President

STATE OF MONTANA)

:

County of Yellowstone)

This record was acknowledged before me on _____, 2020 by _____, as President of Downtown Billings Partnership.

Notary Public for the State of Montana

THE CITY OF BILLINGS, MONTANA (“CITY”)

By: _____

Its: Mayor

By: _____
Its: City Clerk

STATE OF MONTANA)
 :
County of Yellowstone)

This record was acknowledged before me on _____, 2020 by _____ and _____ as Mayor and City Clerk of the City of Billings, Montana.

Notary Public for the State of Montana

Kibler and Kirch, LLC, a Montana limited liability company (“DEVELOPER”)

By: _____
Its: _____

STATE OF MONTANA)
 :
County of Yellowstone)

This record was acknowledged before me on _____, 2020 by _____ as _____ of Downtown Properties, LLC, a Montana limited liability company.

Notary Public for the State of Montana