

DEVELOPMENT AGREEMENT

THIS DEVELOPMENT AGREEMENT (this “Agreement”) is made and entered into as of [_____, 2024], by and between Former Federal Building Landlord, LLC, a Montana limited liability company (the “Lessor”), and the City of Billings, Montana (the “Developer”).

RECITALS

WHEREAS, the Lessor is the owner of a sub-leasehold interest in the building located at 316 North 26th Street, in Billings, Montana and commonly known as the James F. Battin Federal Building (the “Building”), as well as certain other improvements, and the tract(s) of land upon which the Building is located (collectively, the “Land” and, together with the Building, the “Property”); and

WHEREAS, the rehabilitation of the Building will help ensure the preservation and protection of a historic building through the restoration of the historic interior and exterior of the Building, and the development of the Building into office space and other related amenities and improvements that will qualify for Historic Tax Credits (collectively, the “Project”); and

WHEREAS, the Lessor is governed by that certain Operating Agreement of the Lessor, dated as of even date herewith (the “Operating Agreement”), by and between FIB Battin, LLC, a Delaware limited liability company (the “Investor”), and Former Federal Building Manager, LLC, a Montana limited liability company (the “Managing Member”); and

WHEREAS, the Lessor desires to appoint the Developer to provide certain services for the Lessor with respect to overseeing the development of the Building until all development work is completed.

NOW, THEREFORE, in consideration of the foregoing, of the mutual promises of the parties hereto, and of other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

1. Appointment. The Lessor hereby appoints the Developer to render services for the Lessor, and confirms and ratifies the appointment of the Developer with respect to services rendered for the Lessor to date, in supervising and overseeing the rehabilitation of the Building as herein contemplated.

2. Authority. The Developer shall have, and has had, the authority and the obligation to:

(a) act on behalf of the Lessor in its relation with any governmental agency or authority and any lender with respect to all matters relating to the Rehabilitation;

(b) help select the Architect, coordinate the preparation of the plans and specifications (the “Plans and Specs”) and recommend alternative solutions whenever design details affect construction feasibility or schedules;

- (c) ensure that the Plans and Specs are in compliance with all applicable codes, laws, ordinances, rules and regulations;
- (d) negotiate all necessary contracts and subcontracts (including the Construction Contract) for the Rehabilitation;
- (e) choose the products and materials necessary to equip the Building in a manner which satisfies all requirements of the Plans and Specs;
- (f) monitor disbursement and payment of amounts owed the Architects and the subcontractors;
- (g) insure that the Building is rehabilitated free and clear of all mechanics' and materialmen's liens;
- (h) obtain an Architect's certificate that the work on the Building is substantially complete, and inspect the Architect's work;
- (i) secure all building code approvals and obtain certificates of occupancy for the Building;
- (j) cause the Rehabilitation to be completed in a prompt and expeditious manner, consistent with good workmanship, and in compliance with the following:
 - (i) the Plans and Specs as they may be amended by the agreement of the parties hereto;
 - (ii) any and all obligations of the Lessor under any financing transaction; and
 - (iii) any and all zoning regulations, county ordinances, including health, fire and safety regulations, and any other requirements of federal, state and local laws, rules, regulations and ordinances applicable to construction of the Building;
- (k) cause to be performed in a diligent and efficient manner the following:
 - (i) Rehabilitation of the Building; and
 - (ii) general administration and supervision of the Rehabilitation, including but not limited to activities of subcontractors and their employees and agents, and others employed as to the Building in a manner which complies in all respects with the Plans and Specs;
- (l) keep, or cause to be kept, accounts and cost records as to the Rehabilitation;
- (m) maintain, or cause to be maintained, at its expense, all office and accounting facilities and equipment necessary to adequately perform the foregoing functions;

(n) make available to the Lessor, during normal business hours and upon the Lessor's written request, copies of all material contracts and subcontracts;

(o) deliver to the Lessor a dimensioned as-built survey of the real property and as-built drawings of the Building construction;

(p) provide, and periodically update a Building construction time schedule which coordinates and integrates the Architect's services with construction schedules;

(q) investigate and recommend a schedule for purchase by the Lessor of all materials and equipment requiring long lead time procurement, coordinate the schedule with the Architect and expedite and coordinate delivery of such purchases;

(r) prepare pre-qualification criteria for subcontractors interested in the Rehabilitation, establish bidding schedules and conduct pre-bid conferences to familiarize bidders with the bidding documents and management techniques with any special systems, materials or methods;

(s) receive bids, prepare bid analyses and make recommendations to the Lessor for award of contracts or rejection of bids;

(t) coordinate the work of the Architect to complete the Rehabilitation in accordance with the objectives as to cost, time and quality, and provide sufficient personnel at the Property with authority to achieve such objectives;

(u) provide a detailed schedule of realistic activity sequences and durations, allocation of labor and materials and processing of shop drawings and samples;

(v) provide regular monitoring of the schedule as construction progresses, identify potential variances between scheduled and probable completion dates, review the schedule for work not started or incomplete, recommend to the Lessor adjustments in the schedule to meet the probable completion date, provide summary reports of such monitoring, and document all changes in the schedule;

(w) recommend courses of action to the Lessor when requirements of subcontracts are not being fulfilled;

(x) revise and refine the approved estimate of Rehabilitation cost, incorporate changes as they occur, and develop cash flow reports and forecasts as needed;

(y) provide regular monitoring of the approved estimate of Rehabilitation cost, show actual costs for activities in process and estimates for uncompleted tasks, identify variances between actual and budgeted or estimated costs and advise the Lessor whenever projected costs exceed budgets or estimates;

(z) develop and implement a system for review and processing of change orders as to the Rehabilitation;

(aa) develop and implement a procedure for the review and processing of applications by subcontractors for progress and final payments;

(bb) in collaboration with the Architect, establish and implement procedures for expediting the processing and approval of shop drawings and samples;

(cc) record the progress of the Building and, upon Lessor's written request, submitting written progress reports to the Lessor, including the percentage of completion and the number and amounts of change orders;

(dd) select the preservation consultant for the historical components of the development and Rehabilitation, if necessary;

(ee) complete and submit all forms necessary for the Part 1 and Part 2 designations, and incorporate all recommendations from the National Park Service in the plans and specifications as they relate to the Building;

(ff) assist with the documentation of the pre-rehabilitation conditions of the interior and exterior of the Building; and

(gg) coordinate and consult with the State Historic Preservation Office to fulfill the eligibility requirements of the Rehabilitation.

3. Development Fee. For services performed and to be performed under Sections 1 and 2 of this Agreement (which services do not include, and the Developer shall take no actions which pertain to, the acquisition of the Land, the admission of the Investor as a member of the Lessor and/or the obtaining of any loan), the Lessor agrees to pay the Developer a development fee in the aggregate amount of \$[] (the "Development Fee"), subject to the terms and conditions of the Operating Agreement. The entire Development Fee shall be deemed to have been earned upon Placement in Service of the Building. Any Development Fee remaining after application of all Development Sources shall be deferred with interest at the applicable federal rate and shall be paid as provided in the Operating Agreement. Notwithstanding the foregoing, the entire unpaid balance of the Development Fee shall be due and payable in all events by the Lessor not later than the fifth anniversary of Placement in Service of the Building in accordance with the Projections and the Operating Agreement.

4. Withholding of Fee Payments. In the event that the Developer shall not have substantially complied with any material provisions under this Agreement, then the Developer shall be in default of this Agreement. In the event that the Developer shall remain in default of this Agreement after Notice and a sixty (60) day opportunity to cure such default (unless a longer period is reasonably required for such cure and Developer is diligently pursuing such cure, such longer period not to exceed one hundred twenty (120) additional days), the Lessor may terminate this Agreement and/or withhold any payments due hereunder.

All amounts so withheld by the Lessor under this Section 4 shall be promptly released to the Developer only after the Developer has cured the default justifying the withholding, as demonstrated by evidence reasonably acceptable to the Lessor.

5. Accounts and Records.

(a) The Developer on behalf of the Lessor, shall keep such books of account and other records as may be required and approved by the Managing Member, including, but not limited to, records relating to the costs of construction advances. The Developer shall keep vouchers, statements, receipted bills and invoices and all other records, in the form approved by the Managing Member, covering all collections, if any, disbursements and other data in connection with the Project prior to final completion of construction and rehabilitation. All accounts and records relating to the Project, including all correspondence, shall be surrendered to the Lessor, upon demand without charge therefor.

(b) All books and records prepared or maintained by the Developer shall be kept and maintained at all times at the place or places approved by the Managing Member, and shall be available for and subject to audit, inspection and copying by the Managing Member or any representative or auditor thereof or supervisory or regulatory authority, at the times and in the manner set forth in the Operating Agreement.

6. Assignment of Fees. The Developer shall not assign, pledge or otherwise encumber, for security or otherwise, the Development Fee set forth above to be made by the Lessor, or any portion(s) thereof or any right(s) of the Developer thereto, without prior Consent of and Notice to the Lessor.

7. Reserved.

8. Termination. If the Managing Member withdraws from the Lessor for any reason whatsoever, including the removal of the Managing Member as the managing member of the Lessor and/or the Managing Member interest in Lessor being converted into a non-managing member interest, this Agreement shall terminate effective on the date of such withdrawal (an “Early Termination”) unless the Lessor and the Investor otherwise elect in writing. Notwithstanding any Early Termination, the Developer shall be entitled to receive payments of the Development Fee to the extent earned when and as specified under this Agreement. The Developer shall have no right to terminate this Agreement without the Consent of the Lessor and the Investor, which Consent may be withheld in the sole discretion of either party.

9. No Lien Filings. The Developer hereby represents, warrants and covenants that neither it nor its Affiliates shall file a mechanic’s lien, materialmen’s lien or other lien against the Project or any other assets of the Lessor (other than as permitted by the Operating Documents or the Lease Purchase Finance Documents), and hereby waives and releases any right it may have or may hereafter acquire to file such a lien against the Project or any other assets of the Lessor. The Developer shall indemnify and hold harmless the Lessor and the Investor from any losses, damages, and/or liabilities, to or as a result of a breach of this provision.

10. Successors and Assigns, Termination. This Agreement shall be binding on the parties hereto, their heirs, successors, and assigns. However, this Agreement may not be assigned by any party hereto without the Consent of the Lessor and the Investor, nor may it be terminated without the Consent of the Lessor and the Investor.

11. Defined Terms. Capitalized terms used in this Agreement and not specifically defined herein shall have the meanings assigned to them in the Operating Agreement.

12. Separability of Provisions. Each provision of this Agreement shall be considered separable and if for any reason any provision which is not essential to the effectuation of the basic purposes of this Agreement is determined to be invalid and contrary to any existing or future law, such invalidity shall not impair the operation of or affect those provisions of this Agreement which are valid.

13. Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed to be an original copy and all of which together shall constitute one agreement binding on all parties hereto, notwithstanding that all the parties shall not have signed the same counterpart.

14. No Continuing Waiver. The waiver by any party of any breach of this Agreement shall not operate or be construed to be a waiver of any subsequent breach.

15. Applicable Law. This Agreement shall be construed and enforced in accordance with the laws of the State of Montana.

16. Waiver of Jury Trial. **EACH PARTY TO THIS AGREEMENT HEREBY EXPRESSLY WAIVES ANY RIGHT TO TRIAL BY JURY OF ANY CLAIM, DEMAND, ACTION OR CAUSE OF ACTION (a) ARISING UNDER THIS AGREEMENT, INCLUDING WITHOUT LIMITATION, ANY PRESENT OR FUTURE AMENDMENT THEREOF, OR (b) IN ANY WAY CONNECTED WITH OR RELATED OR INCIDENTAL TO THE DEALINGS OF THE PARTIES HERETO OR ANY OF THEM WITH RESPECT TO THIS AGREEMENT OR ANY OTHER INSTRUMENT, DOCUMENT OR AGREEMENT EXECUTED OR DELIVERED IN CONNECTION HERewith, OR THE TRANSACTIONS RELATED HERETO OR THERETO, IN EACH CASE WHETHER SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION IS NOW EXISTING OR HEREAFTER ARISING, AND WHETHER SOUNDING IN CONTRACT OR TORT OR OTHERWISE; AND EACH PARTY HEREBY AGREES AND CONSENTS THAT ANY SUCH CLAIM, DEMAND, ACTION OR CAUSE OF ACTION SHALL BE DECIDED BY COURT TRIAL WITHOUT A JURY AND THAT ANY PARTY TO THIS AGREEMENT MAY FILE AN ORIGINAL COUNTERPART OR A COPY OF THIS SECTION WITH ANY COURT AS WRITTEN EVIDENCE OF THE CONSENT OF THE PARTIES HERETO TO THE WAIVER OF ANY RIGHT THEY MIGHT OTHERWISE HAVE TO TRIAL BY JURY.**

17. Third Party Beneficiary. The Investor is a third-party beneficiary of this Agreement, and the Lessor and the Developer hereby expressly agree that any amendment to this Agreement shall not be effective unless and until same is Consented to by the Investor.

Signature page follows

IN WITNESS WHEREOF, the parties have caused this Development Agreement to be duly executed as of the date first written above.

LESSOR:

**FORMER FEDERAL BUILDING
LANDLORD, LLC,**
a Montana limited liability company

By: _____
Name: _____
Title: _____

DEVELOPER:

CITY OF BILLINGS, MONTANA

By: _____
Name: _____
Title: _____