

FIRST AMENDMENT TO DEVELOPMENT AND REIMBURSEMENT AGREEMENT

ADELAIDE POINTE

This FIRST AMENDMENT TO DEVELOPMENT AND REIMBURSEMENT AGREEMENT (“Agreement”) is made _____, 2022 (“Effective Date”) between the **City of Muskegon Brownfield Redevelopment Authority** (“Authority”), a Michigan public body corporate, with an address of 933 Terrace Street, Muskegon, MI 49440 (“Authority”), **City of Muskegon**, a Michigan Municipal Corporation (“City”), with an address of 933 Terrace St., Muskegon, MI 49440, and **Adelaide Pointe Qozb, LLC** (“APQ”), with an address of 1204 W. Western Avenue, Muskegon, MI 49441. Authority, City and APQ are at times referred to as a “Party” or together as “Parties”.

Background

APQ owns approximately 30 acres of waterfront brownfield property which is located at the west end of West Western Avenue within the City of Muskegon.

The City owns certain property adjacent to, and to the east of, the APQ Property commonly known as Hartshorn Marina which the City has previously used for public small boat slip rentals and related activities. The APQ Property and the City Property may be collectively referred to as the “Property”.

APQ and the City have entered into a “Cooperative Use and Development Agreement” which substantiates APQ’s and the City’s desire to a) utilize each other’s specified property for beneficial use b) cooperate in the pursuit of funding for improvements to each other’s Property c) assist one another with applications and approvals for improvements and d) make improvements as specified in the APQ PUD approved by the City Commission on September 13, 2022.

APQ intends to develop the Property for mixed uses including boat storage, boat dockage, in-out boat service, marinas, residential condominiums, commercial uses, and open space and recreational areas (“Development”). The specific improvements to be included in the Development will be defined in the Cooperative Use Agreement, addendums to this Agreement and the Planned Unit Development Agreement (“PUD”) to be submitted to the City (“Development Agreements”).

Authority, City and APQ entered into a Development and Reimbursement Agreement effective _____, 202____, which was approved by the Authority on November 9, 2021 and by the City on November 23, 2021. Pursuant to that Agreement, APQ and City were to perform “eligible activities” and be reimbursed, as defined and provided for in that Agreement.

The Parties agree as follows and that to the extent this Agreement and the Development and Reimbursement Agreement vary, this Agreement shall control:

1. **Background.** The Parties agree the Background paragraphs are true and correct and are incorporated into the body of this Agreement.
2. **Improvements.** APQ will develop both the APQ Property and the City Property as a mixed-use development including boat storage, boat dockage, in-out boat service, marinas, residential condominiums, commercial uses, and open space and recreational areas.

3. **Indemnity and Insurance.** APQ holds the City harmless and will indemnify the City for any liability, including attorney fees, resulting from the engineering, design and construction of the Project. City and APQ will name the other on their respective general liability insurance policies.
4. **Changes, Standards and Dedication.** All improvements must be made according to the plans and specifications of the APQ PUD approved by the City. All construction of Public Improvements must be completed to the standards established by the City of Muskegon (“City Standard”). The City will accept a dedication of all or any portion of the Public Improvements only if built to City Standards.
5. **Addendum Presentation.** APQ shall, from time to time, present addendums to the City that detail discrete development projects that improve the Property according to the PUD. To the extent the addendums addresses “eligible expenses” and expenses to be reimbursed by the Authority, the addendums shall also be provided to the Authority for purposes of Amending the Development and Reimbursement Agreement and the Brownfield Plan. These addendum shall detail Authority, City and APQ obligations to one another and shall include but not be limited to:
 - a. Architectural and/or Engineering drawings
 - b. Construction schedules
 - c. Construction budgets
 - d. Itemization of relevant Brownfield Reimbursements that will be paid to APQ by City
 - e. Proof of financing
6. **Addendum Approvals.** Upon receiving necessary Authority and City approvals of each Addendum all parties shall be obligated to perform under the obligations detailed in the addendum. Approvals by Authority and City shall not be unreasonably withheld if they are compliant with improvements approved in APQ’s PUD.
7. **Funding for Brownfield Reimbursements.**
 - a. *Bonds for roads, water mains and sewer mains.* The City or Authority, in the City’s and Authority’s sole discretion as to which is the borrower, upon approval of an Addendum shall sell municipal bonds in an amount equal to the total amount necessary to pay for roads, water mains, and sewer mains on the Property required by the addendum, supported by engineering and construction bids itemized in the addendum(s) to this Agreement. City or Authority shall be entitled to retain an engineer of its choosing to review all drawings and inspect all amenities that are expected to be eventually turned over to the City in order to insure that the amenities are constructed to city standards, to develop as-built drawings, and otherwise represent the City and Authority on the construction of the public amenities. The cost of the City’s or Authority’s retained engineer shall be paid for from the bond. At no point may the Authority’s and City’s total borrowing, whether still outstanding or not, exceed an aggregate amount of \$10,500,000, including the cost of Civil Engineering expenses paid by APQ up until the date of this agreement and the City’s or Authority’s engineer. The bond proceeds shall be available to reimburse APQ the costs related to the costs for roads, water mains and sewer mains approved in the itemization of Brownfield Reimbursements detailed in each addendum. APQ may apply to the Authority for draw of such bond proceeds. If the draw request includes the proper documentation, the Authority will pay the draw within 15 days of receipt of the request, subject to and in accordance with the following requirements and conditions.

- i. All draw requests shall be in writing together with all supporting documentation, including receipts, and not be made more frequent than 30 day intervals.
 - ii. Each draw request shall include the most recent Sworn Statement and corresponding lien waiver from every contractor, sub-contractor, and supplier who will be paid from that draw.
- b. *Brownfield Tax Increment Financing.* APQ has submitted to the Authority an amendment to the current brownfield plan. Pursuant to the Brownfield Redevelopment Financing Act, Act 381 of the Public Acts of Michigan of 1996 as amended (“Act 381”) the Authority adopted the brownfield plan amendment on October 12, 2021 (the “Brownfield Plan Amendment”) to add the APQ Property.
 - i. The Property is included in the Brownfield Plan Amendment as an “eligible property” because it is a “facility” as defined by Part 201 of the Natural Resources and Environmental Protection Act (“Part 201”).
 - ii. Neither the City nor APQ is a liable party, under Part 201, for remediation of any existing contamination on the Property.
 - iii. APQ has and will continue to conduct Eligible Activities (as defined in Act 381) on the Property to address environmental and other brownfield conditions, in addition to the construction of roads, water mains and sewer mains, in a collaborative effort to position the Property for redevelopment. Actual expenditures by the Parties to undertake eligible environmental activities on the Property are estimated to be \$35 million dollars not including interest. Eligible demolition and site preparation costs incurred by these same parties is estimated to exceed \$13 million dollars. These efforts are aimed at facilitating the redevelopment of the Property as a transformational mixed-use project, including residential and various commercial uses (the “Project”).
 - iv. The Project will include demolition activities, performance of baseline environmental assessment activities, due care and other environmental response activities, site preparation activities, demolition activities, construction of infrastructure improvements, Brownfield Plan Amendment and work plan preparation, contingency, interest and other Eligible Activities, all as described in the Brownfield Plan Amendment and eligible for reimbursement under Act 381.
 - v. The cost of Eligible Activities may be incurred by the City and APQ, The total cost of the Eligible Activities in the Brownfield Plan Amendment, including contingencies, is estimated to be \$35 million dollars (the “Total Eligible Brownfield TIF Costs”). To accommodate the lapse in time from when costs of Eligible Activities are incurred to when tax increment revenues become available for reimbursement of those costs, interest at the rate of 5% per annum is also included in the Brownfield Plan Amendment in the estimated total amount of \$28 million dollars (collectively, the interest plus the costs of Eligible Activities are referred to as the “Total Eligible Brownfield TIF Costs”).

- vi. The Eligible Activities will facilitate redevelopment of the Property which will improve the environmental and aesthetic condition of the Property, increase employment within the City, increase tax base within the City, and otherwise enhance the economic vitality, environmental health and quality of life in the City.
- vii. Act 381 permits the Authority to capture and use the school tax (where applicable), if permitted by the state, and local property tax revenues (both real and personal property) generated from the incremental increase in property value of a redeveloped brownfield site constituting an “eligible property” under Act 381 to pay or to reimburse the cost of Eligible Activities conducted on the “eligible property” (the “Brownfield TIF Revenue”).
- viii. In accordance with Act 381, the parties desire to establish a procedure for using the available Brownfield TIF Revenue generated from the Property to reimburse the City and APQ for completion of Eligible Activities on the Property in amounts not to exceed the Total Eligible Brownfield TIF Costs.
- ix. During the Term (defined below) of this Agreement, the Authority shall reimburse the City first for the total cost of the bonds (principal, interest and transaction costs) incurred and to be incurred for roads, water mains and sewer mains and after the City has been paid the amount the City has committed to pay APQ for the roads, water mains and sewer mains, then to APQ for the cost of Eligible Activities conducted on the Property from the Brownfield TIF Revenue collected from the Property in accordance with the Brownfield Plan Amendment, unless modified by later addendums or amendments. The amount reimbursed to the APQ for the Eligible Activities shall not exceed the lesser of (a) the cost of Eligible Activities incurred by the Property Owner plus interest, or (b) the Total Eligible Brownfield TIF Costs plus interest. The Authority shall capture Brownfield TIF Revenue from the Property and reimburse the City for the cost of the bonds (principal, interest and transaction costs) for roads, water mains and sewer mains and APQ for the cost of Eligible Activities incurred by the Parties until the earlier of the Parties being fully reimbursed or December 31, 2056 (“Term”). If the Term ends before the full reimbursement of all Total Eligible Brownfield TIF Costs, the last reimbursement payment by the Authority shall be the summer and winter tax increment collected during the final year of this Agreement.
- x. Reimbursement payments shall be made on a semi-annual basis as incremental local and school taxes are captured and available.
- xi. During the term of this Agreement, the Authority shall capture all approved and authorized Brownfield TIF Revenue from the Property and use those revenues as provided in this Agreement.
- xii. Intentionally left blank.
- xiii. Reimbursement Process.

1. APQ shall periodically submit to the Authority a “Request for Cost Reimbursement” of Eligible Activities paid for by APQ during the term of this Agreement. All costs for the Eligible Activities must be consistent with the approved Brownfield Plan Amendment. APQ must include documentation sufficient for the Authority to determine whether the costs incurred were for Eligible Activities, including detailed construction draws or invoices and proof of payment or lien waivers. Copies of all invoices for Eligible Activities must note what Eligible Activities they support.
2. Within forty-five (45) days after a Request for Cost Reimbursement has been reviewed and approved by the City’s or Authority’s engineer as required in Section 7.a and reviewed and approved by the Authority or designate as to whether it is an “eligible expense”, and after the Authority or City has been fully paid for roads, water mains and sewer mains, the Authority shall pay to APQ the amounts for which submissions have been made pursuant to this Agreement, less a 10% retainage until all of the water mains, sewer mains and road construction is completed and accepted by the City. The Authority’s obligation to pay APQ is limited to available Brownfield TIF Revenue from the Property.
3. All requests for Cost reimbursement submitted by APQ for each approved Addendum between City, APQ, and the City of Muskegon Brownfield Redevelopment Authority and all requests for cost reimbursement submitted by future owners of all or a portion of the APQ Property pursuant to a separate Development and Reimbursement Agreement(s), shall be reimbursed in the order in which they are received by the City of Muskegon Brownfield Redevelopment Authority from the portion of the Brownfield TIF revenue, excluding the portion to be paid to City which shall be paid first, as described above.
4. The Parties shall cooperate with the Authority’s review by providing information and documentation to supplement the Request for Cost Reimbursement which may be reasonably requested by the Authority during its review period.
5. All or any portion of any Request for Cost Reimbursement that is not paid within 45 days after receipt by the Authority shall accrue simple interest at the rate of five percent (5%) per annum from the date the Request for Cost Reimbursement is submitted to the Authority for payment until the earlier of the date of full reimbursement, including interest. The payment of interest shall be subject to the following limitations (i) to the extent there is not sufficient Brownfield TIF Revenue captured and collected in a fiscal year and permitted to be used to pay interest accruing in such fiscal year, any unpaid interest shall not be paid, but shall carry over to the next fiscal year, (ii) interest carried over to subsequent fiscal years shall not accrue interest (i.e.,

no interest on interest), and (iii) interest on School Taxes captured shall only be payable to the extent permitted by the Michigan Strategic Fund (“MSF”) and/or the Michigan Department of Environment, Great Lakes and Energy (“MEGLE”).

6. The Authority shall have no obligation to reimburse the City or any other entity for Eligible Costs or interest from Brownfield TIF Revenue captured after 35 years after the date of the adoption of the Development and Reimbursement Agreement.

xiv. Allocation of Base Value and Priority of Reimbursements.

1. The initial taxable value of the Property as of the date of this Agreement is \$903,810, as set forth in the Brownfield Plan Amendment (“Base Value”). If the Property is divided into two or more separate taxable parcels in connection with the development of the Project, the Base Value shall be allocated to each resulting parcel based upon the relative number of square feet of each parcel. The Base Value allocated to a separate undeveloped parcel in this manner shall be the base value of that parcel for purposes of calculating Brownfield TIF Revenue, regardless of when any Development and Reimbursement Agreement is entered into in connection with the redevelopment of that parcel. Brownfield TIF Revenue generated from any separate parcel divided from the Property after the date of this Agreement shall be available for reimbursement of the Authority’s Administrative Fee and payment of all requests for cost reimbursement submitted by owners of all or any portion of the Property.
2. Notwithstanding any provision in this Agreement to the contrary, the Authority’s annual TIF Management Administrative Fee, as described in the Brownfield Plan Amendment, shall be paid to the Authority each year to the extent that Brownfield TIF Revenue has been captured and collected during that year, prior to the payment of any Request for Cost Reimbursement.

xv. Adjustments.

1. Until the cost of eligible activities is fully reimbursed, APQ agrees to waive any appeal of any tax assessment or reassessment of any portion of the Property; *provided, however*, that this waiver shall not be binding on any person or entity who acquires title to all or any portion of the Property after the date of this Agreement.
2. If, due to an appeal of any tax assessment or reassessment of any portion of the Property, or for any other reason the Authority is required to reimburse any Brownfield TIF Revenue previously paid to the City, APQ or any future owner to any tax levying unit of government, the Authority may deduct the amount of any such

reimbursement, including interest and penalties, from any amounts due and owing the City and APQ. If all amounts due the City and APQ under this Agreement have been fully paid or the Authority is no longer obligated to make any further payments to the City or APQ, the Authority shall invoice the City and APQ for the amount of such reimbursement and the City and APQ shall pay the Authority such invoiced amount within 45 days of receipt of the invoice. Amounts invoiced and paid to the Authority by the City or APQ pursuant to this Section shall be reinstated as Eligible Activities for which the City and APQ shall have the opportunity to be reimbursed in accordance with the terms, conditions and limitations of this Agreement.

xvi. Legislative Authorization.

This Agreement is governed by and subject to the restrictions set forth in Act 381. If there is legislation enacted in the future that alters or affects the amount of Brownfield TIF Revenue subject to capture, eligible property, or Eligible Activities, then the Property Owner's rights and the Authority's obligations under this Agreement shall be modified accordingly as required by law, or by agreement of the parties.

8. **Notices.** All notices, approvals, consents and other communications required under this Agreement shall be in writing and shall be deemed given: (i) when delivered in person; (ii) when sent by fax or email; (iii) when sent by a nationally-recognized receipted overnight delivery service with delivery fees prepaid; or (iv) when sent by united states first-class, registered, or certified mail, postage prepaid. The notice shall be effective immediately upon personal delivery or upon transmission of the fax or email; one day after depositing with a nationally recognized overnight delivery service; and five days after sending by first class, registered, or certified mail. Notices shall be sent to the parties as follows:

To: City of Muskegon
933 Terrace Street
Muskegon, MI 49440
Attn: City Manager

To: APQ
1204 W. Western Ave.
Muskegon, MI 49440
Attn: Ryan Leestma

w/copy to:

w/copy to:

Parmenter Law
601 Terrace Street
Muskegon, Michigan 49440
Attn: City Attorney

Jaffe, Raitt Heuer & Weiss, P.C.
27777 Franklin Rd. Suite 2500
Southfield, Michigan 48034
Attn: Kenneth J. Clarkson

9. **Recording.** This Agreement shall not be recorded; however, upon the request of either party hereto, the other party shall join in the execution of a memorandum or "short form" of this Agreement for the purposes of recordation.
10. **Force Majeure.** Notwithstanding anything herein to the contrary, if due to a Force Majeure Event (defined below), APQ and/or City is prevented from timely performing under this Agreement or any third-party providing services or required information in connection with this Agreement (e.g.: lender, appraiser, title company, surveyor,

environmental consultants, governmental jurisdictions, etc.) closes its offices, suspends operations or otherwise prevents APQ and/or the City from timely performing under the Agreement as originally contemplated, then the applicable outstanding dates, deadlines or time periods herein, shall each be extended for the duration of the Force Majeure Event and shall resume on such date that APQ and the City, as applicable, are once again able to perform their obligations under this Agreement. To invoke the tolling of time periods as set forth herein for a Force Majeure Event, the applicable party must send written notice to the other party specifying the reason for invocation and the date on which the tolling of time begins and a subsequent notice shall be delivered to confirm the date the Force Majeure Event ended. The term "Force Majeure Event" as used herein shall mean the following: Act of God; strike, lockout, or other labor or industrial disturbance; war; blockade; public riot; fire; storm; flood; explosion; or other delay caused by unforeseeable circumstances beyond the reasonable control of APQ or the City as applicable, including widespread sickness (including sickness causing quarantine and other "stay at home" or "shelter in place" orders, and including, but not limited to, the Coronavirus Disease 2019.

11. **Severability.** If any term, provision or condition contained in this Agreement shall, to any extent, be invalid or unenforceable, the remainder of this Agreement (or the application of such term, provision or condition to persons or circumstances other than those in respect of which it is invalid or unenforceable) shall not be affected thereby, and each term, provision or condition of this Agreement shall be valid and enforceable to the fullest extent permitted by law.
12. **Miscellaneous.** This Agreement may be amended or modified only by the written agreement of APQ and City. Each exhibit attached to this Agreement is incorporated and made a part of this Agreement as though more fully set forth in this Agreement. If the deadline for performing any act would otherwise fall on a weekend day or a holiday, such deadline shall automatically be extended to the next succeeding business day. This Agreement shall be interpreted under and governed by the laws of the State of Michigan. All representations and warranties made in this Agreement by APQ and City shall survive the termination of this Agreement for a period of one year.
13. **Counterparts; Electronic Signatures.** This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original, but all of which together shall be deemed to be one and the same instrument. Electronically imaged signatures may be used in place of original signatures on this Agreement. APQ and City intend to be bound by the signatures on the electronically imaged document, are aware that the other party will rely on such signatures, and hereby waive any defenses to the enforcement of the terms of this Agreement based on the form of signature.
14. **Binding Effect.** This Agreement shall be binding upon and enforceable by the parties and their respective legal representatives, successors, and assigns.
15. **Assignment or Delegation.** Neither party shall assign or delegate all or any portion of its rights or obligations contained in this Agreement without the express or prior written approval of the other party, in which approval may be withheld in the other party's sole discretion.

- 16. Estoppel.** If requested by APQ, City will provide an estoppel certificate to such party as requested by APQ which certificate shall provide, if true, that the Development Agreement and the exhibits represent the entire agreement between APQ and City and that no defaults exist under the Development Agreement and no events have occurred that would, with notice or the expiration of a period of time, constitute a default.

[Signature Page Follows]

AUTHORITY:

CITY OF MUSKEGON BROWNFIELD REDEVELOPMENT AUTHORITY,
a Michigan public body

BY _____

Name:
Title: Chair
Date: _____, 2022

BY: _____

Name:
Title: Secretary
Date: _____, 2022

CITY:

CITY OF MUSKEGON,
a municipal corporation

BY _____

Name: Kenneth D. Johnson
Title: Mayor
Date: _____, 2022

BY: _____

Name: Ann Meisch
Title: Clerk
Date: _____, 2022

APQ:

ADELAIDE POINTE QOZB, LLC,
A Michigan limited liability company

By _____

Name: Ryan M. Leestma
Title: Owner
Date: _____, 2022