

## MEMORANDUM

May 14, 2020

TO: Mayor John P. Kahl and Members of the City Council

FROM: City Attorney's Office (Dennis R. Triggs)

SUBJECT: Flaherty & Collins / Development Agreement

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**DISCUSSION:** Flaherty & Collins Development, Inc. is an experienced developer, owner and manager of high/quality multi-family residential complexes undertaken in conjunction with municipalities. The City staff has engaged in extensive discussion with Flaherty & Collins and presents to the Council a development agreement that is the first step toward the construction of a market-rate, multi-family, four (4) story residential complex of approximately two hundred thirty (230) luxury apartments, approximately ten thousand (10,000) square feet of supporting retail commercial space and approximate 300-350 space structured parking garage on land now owned by the City.

The development project is a major undertaking during challenging economic times. The parties find, however, that there is a demand for market-rate apartments and the project would complement the existing amenities at the Levee District. The project cost estimate is \$45M. Incentives to the developer are conditioned exclusively on future revenue generated by the completed project. Entering into this partnership with Flaherty & Collins is the beginning of a process and there are several contingencies that must be satisfied before the ground breaking. Project completion is targeted for 2022.

**RECOMMENDATION:** Approval.

**RESOLUTION NO. 2021-008**

**East Peoria, Illinois**

\_\_\_\_\_, 2020

**RESOLUTION BY COMMISSIONER \_\_\_\_\_**

**RESOLUTION TO APPROVE DOWNTOWN MIXED-USE  
DEVELOPMENT AGREEMENT**

**WHEREAS**, the City of the East Peoria (“City”) has established, amended and expanded its West Washington Street Redevelopment Project Area (the “TIF District”) under authority of the TIF Act as hereinafter defined; and

**WHEREAS**, the City currently owns property within the TIF District which would serve as a suitable location for a mixed-used project consisting of residential apartments, commercial buildings and related parking facility; and

**WHEREAS**, Flaherty & Collins, Inc. (“Developer”) is an experienced developer, owner and manager of high/quality multi-family residential complexes undertaken in conjunction with municipalities; and

**WHEREAS**, the Developer desires to design, construct, own and manage a multi-family residential apartment complex together with certain commercial elements and an adjacent parking deck on property to be conveyed to the Developer by the City; and

**WHEREAS**, a large residential project in the TIF District will populate the area, enhance the success of the Levee District, serve as a catalyst for further economic development and contribute to a vibrant downtown; and

**WHEREAS**, the Developer and the City have negotiated the terms of a Development Agreement to bring about a project consisting of a market-rate, multi-family, four (4) story residential complex of approximately two hundred thirty (230) luxury apartments, approximately ten thousand (10,000) square feet of supporting retail commercial space and approximate 300-350 space structured parking garage on land now owned by the City; and

**WHEREAS**, the City deems expending funds in an amount not to exceed revenue generated by a large residential project within the TIF District is necessary and desirable for the promotion of economic development;

**NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF EAST PEORIA, TAZEWELL COUNTY, ILLINOIS, THAT:**

**Section 1.** The above recitations are found to be true and correct.

**Section 2.** The Mayor and City Clerk are hereby authorized and directed to execute the Downtown Mixed-Use Development Agreement (attached hereto as Exhibit A), under such terms and conditions as the Mayor in his discretion deems appropriate; provided that the City shall have no obligation under the terms of such Agreement until a fully-executed original has been provided to both the City and the Developer.

**APPROVED:**

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Mayor

**ATTEST:**

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City Clerk

## **DOWNTOWN MIXED-USE DEVELOPMENT AGREEMENT**

**THIS DOWNTOWN MIXED-USE DEVELOPMENT AGREEMENT** (the “Agreement”) made and entered into this \_\_\_\_\_ day of May, 2020 by and between the **CITY OF EAST PEORIA, ILLINOIS**, an Illinois municipal corporation (the “City”) and **FLAHERTY & COLLINS DEVELOPMENT, INC.**, an Indiana corporation (“Developer”).

### **RECITALS**

A. The City has established, amended and expanded its West Washington Street Redevelopment Project Area (the “TIF District”) under authority of the TIF Act as hereinafter defined; and

B. The City currently owns property within the TIF District which would serve as a suitable location for a mixed-used project consisting of residential apartments, commercial buildings and related parking facility; and

C. The Developer desires to design, construct, own and manage a multi-family residential apartment complex together with certain commercial elements and an adjacent parking deck on property to be conveyed to the Developer by the City; and

D. The City has promoted the successful development within the TIF District of retail stores, restaurants and offices in an area commonly known as the Levee District; and

E. A portion of the TIF District is the site of the new Fondulac District Library, a new City Hall and a new park, known as Levee Park; and

F. Past Councils of the City envisioned the development of the Levee District and surrounding areas of the TIF District to include a significant residential component, which vision has not yet been realized; and

G. A large residential project in the TIF District will populate the area, enhance the success of the Levee District, serve as a catalyst for further economic development and contribute to a vibrant downtown; and

H. The City deems expending funds in an amount not to exceed revenue generated by a large residential project within the TIF District is necessary and desirable for the promotion of economic development;

**NOW, THEREFORE**, in consideration of the foregoing recitals and in consideration of the mutual covenants and agreements hereinafter set forth, the City and Developer agree as follows:

**ARTICLE I**  
**DEFINITIONS**

Definitions. As used in the Agreement the following terms shall have the meanings set forth opposite each of them unless the use or context clearly demonstrates that another meaning is intended:

“Agreement” or “this Agreement” means this development agreement between the City and the Developer.

“Base EAV” means the initial equalized assessed value of the Project Site within the meaning of the TIF Act.

“City” means the City of East Peoria, a municipal corporation organized and existing under the laws of the State of Illinois.

“City Code” means the City Code of the City of East Peoria as from time to time amended.

“Closing” means that event at which the City transfers title of the Project Site to the Developer.

“Date of Completion” means the date of substantial completion of the Project.

“Delay” means “acts of God” (i.e. fire, earthquake, unforeseen flood), inclement weather (to the extent the same is extraordinary clearly and beyond the weather conditions typically experienced in the area of the Project Site), strikes, lockouts, labor troubles, inability to procure permits or materials, failure of power, governmental restrictions, acts, omissions or delays of the City, or reasons of a like nature not Developer’s fault.

“Developer” means Flaherty & Collins Development, Inc., an Indiana corporation.

“Development Incentive Annual Payment” means the annual payment of a cash incentive by the City to the Developer to be made on the first day of July each year commencing with the first day of July after the EAV has been determined and the initial Incremental Property Tax Revenue distribution has been received by the City and continuing thereafter through and including 2038.

“EAV” means the final equalized assessed value of the Project Site as annually determined by assessment officials of Tazewell County and the State of Illinois for purpose of real estate taxation.

“Enterprise Zone” means the East Peoria Enterprise Zone heretofore established by the City and administered under regulations found at Title 3, Chapter 30 of the City Code.

“Fiscal Year” means a twelve (12) month period beginning on May 1 of a given calendar year and ending on April 30 of the following calendar year.

“IEPA” means the Illinois Environmental Protection Agency.

“Incremental EAV” means in a given Fiscal Year the amount, if any, by which the most recent EAV exceeds the Base EAV.

“Incremental Property Tax Revenue” means the real estate tax revenue actually received by the City during a given Fiscal Year based upon the extension of the real estate tax levies against the Incremental EAV.

“Multi-Party Agreement” means an agreement by and among the City, the Developer, and the Project Lender pursuant to which (a) the Developer will collaterally assign to the Project Lender all of the Developer’s rights and obligations under this Agreement, and (b) the Project Lender will have the right, but not the obligation, to exercise and perform the Developer’s rights and obligations under this Agreement, which agreement shall contain such other commercially reasonable or customary terms and conditions requested by the Project Lender in connection with this Agreement and/or the Project or the Project Site, in form and substance reasonably satisfactory to the City, the Developer and the Project Lender. An agreement that fails to allow for the reconveyance of the Project Site to the City upon a default by the Developer as described in Section 3.5 of this Agreement shall not be deemed reasonably satisfactory to the City.

“NMTC Allocation” means the award or allocation of an award under the federal New Market Tax Credit Program in an amount satisfactory to the Developer.

“Prevailing Wage” means the general prevailing rate of hourly wages as calculated from time to time by or on behalf of the City under the provisions of the Prevailing Wage Act found at 820 ILCS 130/0.01, et. seq. or any successor statute having substantially the same function.

“Project” means collectively the multi-family residential apartment complex, commercial buildings and adjacent parking deck that Developer will construct on the Project Site.

“Project Lender” means the financial institution making the Project Loan.

“Project Loan” means one or more construction loans to the Developer, the proceeds of which shall be used to (a) acquire the materials to construct all or a portion of the Project, and (b) construct all or a portion of the Project.

“Project Plans, Specifications and Cost Estimates” means the plans and specifications for the Project including, without limitation, architectural drawing for the multi-family residential apartment complex, commercial buildings and adjacent parking deck and estimates for the cost of each component of the Project.

“Project Site” means the property legally described at Exhibit A attached hereto, which is generally depicted on the site plan attached as Exhibit A-1, consisting of approximately 3.431 acres, together with any and all improvements located therein or thereon from time to time.

“TIF Act” means the Tax Increment Allocation Redevelopment Act found at 65 ILCS 5/11-74.4-1, et. seq.

“Title Insurer” means a title insurer selected by the Developer and licensed to issue title insurance in the State of Illinois.

“West Washington Street TIF District” means the redevelopment project area created by the City under the authority of the TIF Act which includes the Project Site within its boundaries.

## **ARTICLE II** **OBLIGATIONS OF THE DEVELOPER**

**2.1 Construction of Project.** Subject to Delays, the satisfaction of the conditions in Section 2.8 and Article IV of this Agreement, and the City’s performance of its obligations hereunder, the Developer shall commence construction of the Project within ninety (90) days after the later to occur of (a) the date that the City confirms in writing pursuant to Section 3.1 of the Agreement that the construction of the Project on the Project Site and the use for its intended purposes is permitted by the IEPA and that the City is not prohibited by any law, regulation or contractual commitment from allowing for the Project to be constructed on the Project Site and used for the intended purposes, or (b) the date of the NMTC Allocation.

**2.2 Multi-Use Development including Multi-Family Residential Apartment Complex.** The Project shall include a market-rate, multi-family, four (4) story residential complex of approximately two hundred thirty (230) luxury apartments, approximately ten thousand (10,000) square feet of supporting retail commercial space and approximately 300–350 space structured parking garage, with the final number of spaces to be determined by the Developer, all as more particularly developed pursuant to Section 2.4 of this Agreement.

**2.3 Total Cost of the Project.** Developer shall expend no less than \$45,000,000 in hard and soft costs on the Project, inclusive of the Development Incentive, but exclusive of the value of the Project Site and any portion of developer fees in excess

of five percent (5%) of the total hard and soft costs of the Project (other than the Developer fees).

**2.4 Submission and review of Project Plans and Specifications.** Subject to the terms and conditions of this Agreement, the Developer shall submit the Project Plans and Specifications to the City as soon as reasonably practicable after the same are completed. The City acting through its Mayor or such other representative of the City as the Mayor may designate such review and within fifteen (15) business days after submission approve or disapprove the Project Plans and Specifications and any subsequent material changes or corrections to the Project Plans and Specifications required to be submitted from time to time. The sole purpose of the review contemplated by this Section is to verify compliance with Sections 2.2 and 2.3 of this Agreement and this initial approval shall indicate only that the Project presented meets the criteria set forth in these two sections. Any notice from the City stating that the Project Plans and Specifications (or changes or corrections to the Project Plans and Specifications) are disapproved shall state with specificity the modifications which are necessary to comply with this Agreement. If the Project Plans and Specifications are disapproved, they shall be resubmitted by the Developer until approved. The City shall be deemed to have approved any submission to which the City fails to respond within such fifteen (15) business day period. Review of the Project Plans and Specifications for compliance with applicable building codes shall be completed through a separate process which shall be conducted in the manner prescribed by the City Code, but expedited with the City's assistance. The City has reviewed the preliminary site plan and building elevation examples attached and views such in a favorable light. The City and Developer mutually acknowledge the importance of developing this Project expeditiously. The City and Developer mutually acknowledge that this Project is a high priority and each party will be engaged during the planning and construction phase of this Project and will each utilize commercially reasonable and diligent efforts to ensure that the planning and construction of the Project is commenced and completed timely.

**2.5 Date of Completion.** Subject to Delays and the City's performance of its obligations hereunder, the Developer shall use commercially reasonable efforts to cause the Date of Completion to be no later than December 31, 2022.

**2.6 Management of the Project.** Subject to the rights of the Project Lender, and except in connection with a refinancing of the Project, Developer shall not, without the City's prior consent, convey or transfer the Project Site for a term of not less than ten (10) years from the date of Completion; provided that during such ten (10) year period, the City shall not unreasonably withhold such consent if the proposed grantee or transferee (i) agrees in writing to the maintenance standard described in Section 2.7 of this Agreement, and (ii) based on financial statements and other information provided to the City, has the qualifications and financial wherewithal to operate and maintain the Project in accordance with such maintenance standard. As used in this Section 2.6 the term "refinancing" refers to a transaction pursuant to which the Developer transfers or conveys an interest in the Project Site to provide security or collateral to a lender, but does not in so doing divest itself of a direct interest in the Project Site.

2.7 **Maintenance Standard.** Developer shall so long as it owns the Project Site maintain the Project in a good, safe, and clean condition, operation, and repair and in compliance with City Code and other applicable laws, consistent with the Developer's or its affiliates' existing portfolio of similar mixed-use projects.

2.8 **Financing Contingency.** The obligations of the Developer under the terms of this Agreement are contingent upon the ability of Developer to secure either independently or in conjunction with the City the Project Loan on terms and conditions satisfactory to the Developer. Developer shall use commercially reasonable efforts to obtain the Project Loan. The City will utilize its best efforts to assist the Developer in obtaining the Project Loan from a lender(s) regularly doing business within the City or in the vicinity of the City.

2.9 **Compliance with Applicable Codes.** Except as otherwise specifically provided herein, Developer shall develop the Project in accordance with all applicable provisions of the City Code or duly-adopted variances thereof, and the City, upon request by the Developer, shall provide assistance in obtaining any such variances.

2.10 **Prevailing Wage.** Developer shall assure that all persons working on the construction of the Project are paid the Prevailing Wage.

2.11 **Taxes and Governmental Charges.** Developer agrees to pay or cause to be paid promptly as and when the same shall become due and payable, all lawful real estate taxes, sales taxes or other lawful taxes, impositions and charges which may be imposed upon the Developer or any part of the Project Site, subject to the Developer's right to contest the same in accordance with applicable laws.

### **ARTICLE III** **OBLIGATIONS OF THE CITY**

3.1 **Permissible Use of Project Site.** The City shall take such measures as may be necessary to assure that the Project Site may be used for the Project and shall confirm in writing to the reasonable satisfaction of the Developer that construction of the Project on the Project Site is permitted by the Illinois Environmental Protection Agency and that the City is not prohibited by any law, regulation or contractual commitment from allowing for the Project to be constructed on the Project Site and used for the intended purposes.

3.2 **Enterprise Zone Incentives.** The Developer shall be entitled to all Enterprise Zone Incentives available by virtue of the location of the Project Site within the boundaries of the Enterprise Zone. Any fees payable by the Developer in connection with the Enterprise Zone Incentives shall be paid on or before the Date of Completion. Developer acknowledges that the real estate tax abatement ordinarily available within the Enterprise Zone is not available within the boundaries of any parcel located within a redevelopment project area created under authority of the TIF Act, including, without

limitation, the West Washington Street TIF District. Consequently, the Project is not eligible for a real estate tax abatement as a consequence of the location of the Project Site within the West Washington Street TIF District.

**3.3 Closing.** At the Closing, the City shall convey the Project Site to the Developer at no cost to the Developer by a recordable warranty deed subject to easements, restrictions and reservations of record approved by the Developer. The City shall convey the Project Site to the Developer in conjunction with the Developer securing the financing necessary to enable Developer to construct the Project. At the Closing, the City shall deliver an owner's or seller's affidavit, non-foreign affidavit, and such other affidavits and instruments as may be requested by the Developer or the Title Insurer, including, without limitation, evidence of the City's authority to execute and deliver this Agreement and such Closing documents. In addition, the City and the Developer shall execute and deliver at the Closing the Multi-Party Agreement. At the Developer's option, at Closing, the Developer may deliver to the City a promissory note pursuant to which the Developer agrees to pay to the City the fair-market value of the Project Site, in amounts, at periods, and at an interest rate determined by the Developer. All documents to be delivered by the parties at Closing shall be in form and substance reasonably satisfactory to the City and the Developer. The City shall pay all closing costs that are customarily the responsibility of the Seller of commercial property in Illinois. The parties shall use commercially reasonable efforts to cause the Closing to occur no later than the second quarter of 2021.

**3.4 Title Insurance.** Within thirty (30) days after the date hereof, the Developer shall procure at the City's expense a commitment to issue an owner's policy of title insurance in the amount of One Million Five Hundred Thousand Dollars (\$1,500,000) issued by the Title Insurer showing a commitment to insure a fee simple absolute title to the Project Site to be vested in the Developer. The Developer shall promptly deliver to the City, which delivery may be electronic, a copy of such commitment. Prior to the Closing, the Developer shall deliver notice to the City of any matters in such commitment that are not acceptable to the Developer. After receipt of said notice, the City shall have the right, at its election, to endeavor to cure such objections to or defects in title set forth therein and shall notify the Developer of such election prior to the Closing. If the City does elect to endeavor to cure such objections to or defects in title, it shall cure such objections prior to or at the Closing. If the City elects not to cure, or fails to respond to, any objections or defects, then the Developer may either (i) waive such title objections to or defects in title and proceed with Closing or (ii) terminate this Agreement. In the event of termination pursuant to this Section 3.4, the parties shall have no further rights or liabilities under this Agreement.

**3.5 Reconveyance of Project Site.** Subject to the rights of the Project Lender under the Multi-Party Agreement, should the Developer fail to commence the Project within the time limits established in Section 2.1 of this Agreement, which failure continues for more than ninety (90) days after notice thereof by the City to the Developer, the City, as its sole remedy, may elect to require the Developer to reconvey the Project Site to the City at no cost to the City free and clear of all encumbrances other than those

encumbrances in existence on the date that the City conveyed the Project Site to the Developer, after which this Agreement shall terminate and be of no further force or effect. If Developer is delayed or prevented from performing any of its obligations hereunder because of Delays, then, except as otherwise specifically provided herein, the period of such Delays shall be deemed added to the time herein provided for the performance of such obligation and Developer shall not be liable for losses or damages caused or resulting from such Delays; provided that this Section shall not apply to any obligation of Developer that can be satisfied by the payment of money.

**3.6 Development Incentive.** The City shall each year for sixteen (16) years make timely payment of the Development Incentive Annual Payment to the Developer. The amount of the Development Incentive Annual Payment for any Fiscal Year shall be the actual Incremental Property Tax Revenue received in such fiscal Fiscal Year. The Developer shall have the right to assign the rights to the Development Incentive Annual Payments and enter into such other agreements and instruments as the Developer deems necessary or desirable to monetize the Development Incentive Annual Payments at the Closing. At the Closing, the City, upon request, shall execute and deliver such agreements and instruments in connection with the foregoing, each in form and substance reasonably satisfactory to the City. The Developer shall be permitted to use the proceeds of the Development Incentive Annual Payment to pay, or reimburse the Developer for, any and all hard and soft costs of the Project.

**3.7 Environmental Conditions.** The City, to the extent such are within the City's possession or control, will provide the Developer with all title, environmental, civil, utility, survey, geotechnical and similar reports that would be of interest to a Developer concerning the Project Site. Developer may also obtain its own third-party reports concerning such matters. The Developer's obligations hereunder shall be contingent on Developer's acceptance or waiver of all matters shown on such reports. If required or recommended by the IEPA in connection with the Project Site, then the City shall perform or cause to be performed additional post-Closing soil, gas, vapor, and/or ground water sampling or monitoring in, on, or about the Project and the Project Site, together with any additional remediation required as a result of such sampling. In connection with any such post-Closing sampling, monitoring, or remediation, the City shall (a) coordinate with the Developer any such sampling and entry upon the Project Site, (b) use commercially reasonable efforts to minimize interference with the Developer's use of, and construction activities upon, the Project and the Project Site, and (c) upon completion of all such sampling and remediation (if any), repair any damage caused to the Project and the Project Site as a result of any such sampling and remediation. Notwithstanding any other provision herein, the City shall have no responsibility for any environmental condition caused by the Developer and not arising from conditions of the Project Site existing prior to conveyance to the Developer. Further, in the event the IEPA declares that development of the Project Site requires sampling, monitoring or remediation that in the reasonable judgment of the City is cost prohibitive, the City may elect to terminate this Agreement upon notice to the Developer delivered prior to the Closing, in which case this Agreement shall be of no further force or effect; provided that, within thirty (30) days after receipt of such notice, the Developer may elect, upon notice to the City, to take on such

sampling, monitoring or remediation obligations that the City reasonably determined is cost prohibitive, in which case the City's termination notice shall be void and of no force or effect.

3.8 **Zoning of the Project Site.** Subject to compliance with procedures set forth in the City Code, prior to the Closing, the City shall assign the Project Site to the zoning classification in the City Code which will allow the Project to be lawfully constructed and operated for its intended uses on the Project Site. In particular, but not by way of limitation, the zoning classification shall allow for first-floor residential use.

#### **ARTICLE IV** **Conditions to Closing**

4.1 **General.** The Developer's obligations to proceed to Closing and construct and operate the Project shall be conditioned on Developer's satisfaction with each of the matters set forth in this Article, each in the Developer's discretion. If any such matter is unsatisfactory to the Developer in any respect, then the Developer may terminate this Agreement upon notice to the City, in which case this Agreement shall be of no further force or effect.

4.2 **Title.** The Developer shall approved the title to the Project Site in accordance with Section 3.4 of this Agreement.

4.3 **Environmental.** The Developer shall have approved the environmental condition of the Project Site.

4.4. **Zoning.** The Developer shall have approved the zoning classification (including any variances thereof) for the Project Site.

4.5 **Project Loan.** The Developer shall have obtained, or be able to obtain, the Project Loan on terms and conditions satisfactory to the Developer, including, without limitation, that the City has executed or will execute the Multi-Party Agreement.

4.6 **NMTC Allocation.** The NMTC Allocation shall have occurred, or the Developer shall be satisfied that the NMTC Allocation will occur.

4.7 **Development Incentive.** The Developer shall have monetized, or determined that it will be able to monetize, the Development Incentive Annual Payments in an amount and on terms satisfactory to the Developer.

4.8 **City's Performance.** The City shall have performed its material obligations under this Agreement and all representations and warranties of the City herein are true and correct in all material respects.

4.9 **Project Approvals.** The Developer shall have obtained, or determined that it will obtain, all permits and approvals necessary for the Project, including, without limitation, the City's approval pursuant to Section 2.4 of this Agreement.

4.10 **Utilities.** Developer shall have determined that gas, electricity, telephone, water, storm and sanitary sewer, and other utility services in adjoining public rights-of-way or properly granted and recorded utility easements are serving or will serve the Project Site at adequate pressures, and in sufficient quantities and volumes, for the construction and use of the Project in accordance with the terms and conditions of this Agreement.

4.11 **Physical Condition.** Prior to the Closing, the Developer and its agents, employees, representatives, and contractors shall have the right to enter upon the Project Site from time to time upon prior notice to the City to perform testing, inspections, examinations, studies, and investigations of the Project Site. The Developer shall have determined that no test, inspection, examination, study, or investigation of the Project Site establishes that there are soil or other conditions that cause an unexpected undue material increase in the cost of the Project.

## **ARTICLE V** **General Conditions**

5.1 **Breach and Opportunity to Cure.** Except for a breach of the Developer's obligation to commence construction, which is governed by the terms and conditions of Section 3.5 of this Agreement, before any failure of any party to this Agreement to perform its obligations under this agreement shall be deemed to be a breach of this agreement, the party claiming such failure shall notify in writing the party alleged to have failed to perform of the alleged failure and shall demand performance. No breach of this Agreement may be found to have occurred if performance is completed to the reasonable satisfaction of the complaining party within thirty (30) days after receipt of such notice or in the case of a failure which by its nature takes an excess of thirty (30) days to cure such longer period of time as may be reasonably necessary to cure the same provided that the curing party is pursuing said cure with commercially reasonable diligence.

5.2 **Remedies in the Event of Breach.** In the event of a breach of this Agreement by either party beyond any applicable notice and cure period or in the event either party is adjudicated as bankrupt or makes a general assignment for the benefit of that party's creditors or if a receiver is appointed on account of a party's insolvency, which is not terminated, dismissed or vacated within sixty (60) days after filing, then the non-breaching party may without prejudice to any other right or remedy and after giving fifteen (15) days' written notice to the breaching party, the non-defaulting may take whatever actions at law or in equity are necessary or appropriate to (a) collect any payments due under this Agreement, (b) protect the rights granted to such non-defaulting party under this Agreement, (c) enforce the performance or observance by the defaulting party of any term or condition of this Agreement (including, without limitation, the right to specifically enforce any such term or condition), (d) cure, for the account of the defaulting party, any failure of the defaulting party to perform or observe a material term or condition of this

Agreement to be performed or observed by it, or (e) if prior to Closing, terminate this Agreement. In the event of such termination, the breaching party shall not be entitled to receive any further payments or benefits provided for under the terms of this Agreement. In the event of a breach by the Developer, the City shall be entitled to all available remedies at law or in equity, including specific performance. In the event of a breach by the City, the Developer shall be entitled to all available remedies at law or in equity, including specific performance. If the non-defaulting party incurs any costs or expenses in connection with exercising its rights and remedies under, or enforcing, this Agreement, then the defaulting party shall reimburse the non-defaulting party for all such costs and expenses, together with interest at the rate of eight percent (8%) per annum. Notwithstanding anything to the contrary in this Section, the City's rights and remedies upon a breach of the Developer's obligation to commence construction shall be as expressly set forth in Section 3.5 of this Agreement.

**5.3 Amendment.** This Agreement and any exhibits attached hereto may be amended only by the mutual consent of the parties including in the case of the City, by the adoption of an ordinance or resolution of the City approving said amendment as provided by law, and by the execution of said amendment by the parties or their successors in interest.

**5.4 No Other Agreements.** Except as otherwise expressly provided herein, this Agreement supersedes all prior agreements, negotiations and discussions relative to the subject matter hereof and fully integrates the agreement of the parties.

**5.5 Binding on Successors.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and permitted assigns. The Developer, without the prior written approval of the City may assign this Agreement, and/or any of the Developer's rights and obligations hereunder, to an entity controlling, controlled by, or under common control with, the Developer, and/or collaterally assign this Agreement to the Project Lender in connection with the Project Loan.

**5.6 Consent.** Except as otherwise provided herein, whenever consent or approval of either party is required, such consent or approval shall not be unreasonably withheld or unduly delayed.

**5.7 Paragraph Headings.** Paragraph headings and references are for the convenience of the parties and are not intended to limit, vary, define or expand the terms and provisions contained in this Agreement and shall not be used to interpret or construe the terms and provisions of this Agreement.

**5.8 Severability.** If any provision, covenant, or portion of this Agreement or its application to any person, entity or property is held invalid, such invalidity shall not affect the application or validity of any other provisions, covenants or portions of this Agreement (and to that end, any provisions, covenants, or portion of this agreement are declared to be severable).

5.9 **Applicable Law.** This agreement shall be construed in accordance with the laws and decisions of the State of Illinois.

5.10 **Notices.** All notices delivered pursuant to this Agreement shall be in writing and shall be deemed to be effective as of the date of actual delivery with personal delivery, the next business day if sent by overnight delivery, or as of the third day from and including the day of posting if mailed by certified or registered mail return receipt requested with postage prepaid:

to the City:	City of East Peoria 401 W. Washington Street East Peoria, IL 61611 Attention: Mayor
with a copy to:	Miller, Hall & Triggs, LLC 416 Main Street, Suite 1125 Peoria, IL 61602 Attention: Dennis R. Triggs
to the Developer:	Flaherty & Collins Development, Inc. One Indiana Square, Suite 3000 Indianapolis, IN 46204 Attention: Julie Collier
with a copy to:	Wallack Somers & Haas, P.C. One Indiana Square, Suite 2300 Indianapolis, IN 46204 Attention: Ryan R. Wilmering

5.11 **Developer Representations.** The Developer represents and warrants to the City that (a) the Developer has not entered into any contracts or undertakings that would limit, conflict with, or constitute a breach of this Agreement, (b) the Developer is an Indiana limited liability company organized and validly existing under the laws of the State of Indiana and, prior to or at Closing, the Developer will be authorized to conduct business in the State of Illinois, (c) the Developer has the power to enter into this Agreement and perform its obligations hereunder, (d) the Developer has been authorized by proper action to execute and deliver this Agreement and perform its obligations hereunder, and (e) this Agreement is the legal, valid, and binding obligation of the Developer.

5.12 **City Representations.** The City represents and warrants to the Developer that (a) the City has not entered into any contracts or undertakings that would limit, conflict with, or constitute a breach of this Agreement, (b) the City is a municipal corporation organized and existing under the laws of the State of Illinois, (c) the City has the power to enter into this Agreement and perform its obligations hereunder, (d) the City has been authorized by proper action to execute and deliver this Agreement and perform its

obligations hereunder, and (e) this Agreement is the legal, valid, and binding obligation of the City.

5.13 **Estoppels.** Upon thirty (30) days' request by the Developer from time to time, the City will execute and deliver to the Developer or to such other person or entity as may be specified by the Developer an estoppel certificate containing such information concerning this Agreement as the Developer may reasonably request, in form and substance reasonably satisfactory to the City.

5.14 **Authority.** Each undersigned person executing this Agreement on behalf of the City and the Developer represents and certifies that (a) he or she has been empowered and authorized by all necessary action of the respective party to execute and deliver this Agreement, (b) he or she has full capacity, power, and authority to enter into and carry out this Agreement, and (c) the execution, delivery, and performance of this Agreement duly have been authorized by such respective entity.

**CITY OF EAST PEORIA**

**FLAHERTY & COLLINS DEVELOPMENT, INC.**

By \_\_\_\_\_  
Its Mayor

By \_\_\_\_\_  
Its \_\_\_\_\_

**ATTEST:**

\_\_\_\_\_  
Its City Clerk

**EXHIBIT A**

[Legal Description of Project Site]

## **EXHIBIT A-1**

[Preliminary Site Plan and General Depiction of the Project Site]