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December 23, 2014

Via E-Mail & facsimile
gnixon@gklaw.com
Fax 920-436-7988

Attorney Tim Nixon
Godfrey & Kahn S.C.
333 Main Street, Suite 600
Green Bay, Wisconsin 54307-3067


Re: Fully signed City-EDA Contract

Dear Tim:

Enclosed please find a fully-signed copy of the City-EDA contract. The City asks for non-interference with this Contract.

Thank you. Happy Holidays.

Very Truly Yours,


GREGG C. HAGOPIAN
Assistant City Attorney
Enclosure

CC by e-mail: Manny Perez
Jeannette Tamayo
Susan Brehm
Russell Craig
Martha Brown

Matt Haessly
Linda Burke
Danielle Bergner
Marquette Baylor

1050-2014-382:211126



U.S. EDA – City of Milwaukee Agreement

(12-23-14 version, CAO Doc. No. 210562)

This Agreement, dated as of December 23, 2014 (the “**Effective Date**”), is made and entered into by and between the United States Department of Commerce, Economic Development Administration (“**EDA**”) and the City of Milwaukee (“**City**”), for the covenants contained herein, and good and valuable consideration, receipt and sufficiency of which are acknowledged.

RECITALS

A. **Grant.** Esperanza Unida, Inc. (“**Esperanza**”), the EDA and the City are parties to an April 6, 1994 EDA Financial Assistance Award (“**Grant**”), under which Esperanza and the City are “Recipients” and whereby EDA granted \$712,800 toward a \$1,056,000 project (the “**Project**”) to improve 611 West National Avenue, Milwaukee, WI (the “**Parcel**”), owned by Esperanza. The Grant funds were spent. The Project was constructed.

B. **Cooperation Agreement.** Per Grant conditions 9 and 17, the City and Esperanza entered a “Lead Agent and Cooperation Agreement” (“**Cooperation Agreement**”), under which Esperanza was appointed Lead Agent. In acting as the Lead Entity for the Grant, Esperanza agreed to “assume all responsibilities for the project to be funded by the Grant. The Lead Entity will undertake the project to be funded by Grant and exercise all powers necessarily related thereto, without necessity of approval by the City. The Lead Entity agrees to comply with all statutory, program and administrative requirements set forth in the Grant Agreement.”

C. **Federal Share.** Per Grant condition 11, Esperanza (the Parcel owner)¹: (i) agreed that if it alienated without EDA’s approval any interest in the Parcel, EDA could recover the **Federal Share** per 13 CFR 314.5² at 67.5%³ times the fair market value of the Parcel at time of disposition⁴, or alternatively, at the amount of the EDA Award plus interest from the date of the disposition; and (ii) Esperanza gave a Mortgage to EDA (the “**EDA Mortgage**”) to secure the possible payment of the Federal Share⁵, with the EDA Mortgage to be in effect for the useful life of the Project (13 CFR 314.6 (a)⁶), specifically, per the EDA Mortgage, 25 years from the date of the Mortgage (i.e., until **March 29, 2019**); and (iii) the EDA Mortgage had to be a first priority, unsubordinated, mortgage lien.

¹ See 13 C.F.R. 314.6, 15 C.F.R. 14.32, and OMB Circular A-110 Attachment N, Item 3, the Parcel owner grants the Mortgage to EDA, and is prohibited from conveying without EDA approval.

² See, also, 13 C.F.R. 314.1 defining “Federal Share” by reference to 314.5. And, see 15 C.F.R. Part 14, § 14.32.

³ \$712,800 Grant divided by \$1,056,000 Project cost = 67.5%.

⁴ Under 13 C.F.R. 314.5 (b), the Federal Share excludes any portion of current fair market value “attributable to...improvements before or after EDA’s participation in the Project, which are not included in the total Project costs.” No evidence of other improvements to the Parcel has been provided. Per 314 (5)(a), in calculating Federal Share, the following are deducted from fair market value: “Reasonable repair expenses, if any, incurred to put the Property into marketable condition” and “Sales, commission and marketing costs.”

⁵ The “now therefore” clause of the EDA Mortgage alternatively states the damage amount as “the Grant Amount or the amount actually disbursed...”

⁶ See also 13 CFR 314.1 defining “Estimated Useful Life” as “the period of years that constitutes the expected useful lifespan of a Project, as determined by EDA, during which EDA anticipates obtaining the economic development benefits of its Investment.”

D. **EDA Mortgage.** The EDA Agreement and Mortgage (“EDA Mortgage”), dated March 29, 1994, was recorded November 29, 1994 in the Milwaukee County Register of Deeds Office (“**ROD**”) as Document No. 7029726⁷. The 3rd “whereas” clause of the EDA Mortgage specifies that a “transfer or conveyance” by Esperanza requires EDA approval and may be restricted to a transferee eligible to receive EDA grants.

E. **BMO.** Without EDA knowledge or approval, per Chicago Title Commitment 00027946 (dated June 16, 2014), Esperanza gave 7 mortgages to M&I Marshall & Ilsley Bank (n/k/a BMO Harris, “**BMO**”). One of the 7 was dated June 14, 1994, and recorded with the ROD on July 14, 1994 (Document No. 6977551) (“**BMO Mortgage 1**”), and another of the 7 was dated August 25, 1994, and recorded with the ROD on September 8, 1994 (Document No. 69991421) (“**BMO Mortgage 2**”). BMO Mortgage 1 and BMO Mortgage 2 were recorded prior to the recording of the EDA Mortgage on November 29, 1994. Despite the prior filings of the BMO Mortgage 1 and BMO Mortgage 2, by letter dated December 7, 1994, Barbara Graham on behalf of Esperanza represented to EDA that the recorded EDA Mortgage created a “valid first priority lien” on the Parcel.

F. **Property Taxes.** EDA Mortgage Section 2 requires Esperanza to protect title and to “pay when due all taxes...now existing or hereafter levied or assessed upon the Property...” Esperanza has not done this. The Parcel is Parcel No. 213 in the City of Milwaukee’s 2014 No. 5 *in rem* property-tax foreclosure file now pending before the Milwaukee County Circuit Court in Case No. 2014-CV-007793. The City brought that action under Wis. Stat. 75.521. The redemption deadline was November 19, 2014, the answer deadline was December 19, 2014, and **the judgment date is January 5, 2015**. There was no redemption by the November 19th deadline.

G. **Insurance.** EDA Mortgage Section 3 requires Esperanza to maintain insurance. Esperanza represented to EDA and the City on November 14, 2014, that the building is uninsured.

H. **EDA Foreclosure.** EDA Mortgage Section 11 provides that if Esperanza breaches the Mortgage, EDA may require payment of the Federal Share and enforce by a mortgage-foreclosure action.

I. **Northpointe.** Without the consent or knowledge of EDA, Esperanza entered into a Commercial Offer to Purchase (the “**PASA**” or Purchase and Sale Agreement) with Northpointe Holdings II, LLC (“**Northpointe**”) dated June 10, 2014 and accepted June 17, 2014.

J. **Placarded & Tax Delinquent.** The Parcel, and two other buildings owned by Esperanza (1313 W. National Ave. and 1329-1331 W. National Ave., Milwaukee), have been placarded by the City due to outstanding code violations and public health, safety and welfare concerns. Each of 611 W. National (\$234,212.80), 1313 W. National (\$9,104.62), 1329-31 W. National (\$10,091.45), and 2556 S. 5th Place (\$322.81) is owned by Esperanza, and each is tax delinquent regarding tax years prior to 2014, with the December, 2014 payoff figures shown, and with tax bills for year 2014 to be mailed in December, 2014.

⁷ Grant condition 11 required the EDA Mortgage to be “perfected in accordance with local law.” See also 13 C.F.R. § 314.8 (b).

K. **Other Creditors.** Besides the EDA Mortgage, on information and belief included among Esperanza's creditors are WE Energies, the United States Internal Revenue Service, the Wisconsin Department of Workforce Development, Wells Fargo Bank, BMO, the City (taxes), contractor(s), and Public Allies, Inc.

L. **Requests to EDA.** On November 14, 2014, the City and Esperanza made requests of the EDA for (i) release of the EDA Mortgage under 13 C.F.R. 314.10 (a) allowing EDA to release its interest after 20 years from the date of the Grant award (i.e., anytime after **April 6, 2014**), (ii) award variance (U.S. Department of Commerce – EDA “Summary of EDA Construction Standards” reference guide, amended November 28, 2007 (the “**EDA Summary**,” Section II.B.), (iii) award modification (EDA Summary, Section VII.A.8.), (iv) termination for convenience (EDA Summary, Section VII.F.2., 15 C.F.R. 14.61 or 24.44), and/or (v) exception under OMB Circular A-110, item 7, and 15 CFR 14.4. EDA, Esperanza and City met to discuss those requests on November 18, 2014, during which meeting EDA declined to release the EDA Mortgage and expressed its intention to enforce its rights, interests, and remedies consistent with the terms of the Grant.

Wherefore

1. **Tax Foreclosure.** The City will continue its tax-foreclosure case. If the City obtains Judgment of foreclosure (**expected date, January 5, 2015**), per Wis. Stat. 75.521 (8), that will quiet title and vest title in the City; and City will become fee simple absolute owner of the Parcel. Subject to the terms and conditions in this Agreement, EDA will not file an answer or attempt to redeem in the City's foreclosure case, or otherwise challenge City's title. City shall keep EDA informed regarding any redemption or answer that may be attempted regarding the Parcel, and regarding any Judgment of tax foreclosure granted to City. There was no redemption by the November 19, 2014 deadline for redemption.

If City is unable to obtain Judgment of tax foreclosure, this Agreement shall terminate; and (i) City and EDA shall meet and confer, EDA understanding that City will not then be the owner, and that Esperanza will own with ownership duties, (ii) City's property taxes, interest and penalties (and any special charge or special assessment) shall continue to run and accrue, (iii) EDA shall consider whether to bring a mortgage-foreclosure action against the Parcel regarding the EDA Mortgage, and keep City apprised of its decision, and (iv) City and EDA retain their respective rights and defenses.

2. **RFP.** Within 5 business days of City becoming owner of the Parcel by tax foreclosure Judgment, *or earlier* in City's discretion, City will issue a Request for Proposals (“**RFP**”) in an effort to find a buyer for the Parcel, which RFP will allow interested parties **20 days** to respond. City shall keep EDA apprised of the RFP, and let EDA know what parties respond, and what terms the potential buyers propose. City will, in this first RFP, recommend a minimum offer price of \$1.3 million.

3. **EDA Approval.** City shall confer with EDA on the proposed sale price to the selected winning buyer (the “**Buyer**”). EDA's approval shall consider: (i) purchase price and amount the

City and EDA can recover (the City for taxes, interest and penalties and **Winterization Costs** [defined below] [the “**City Amount**”], and the EDA for the Federal Share to be determined consistent with 13 C.F.R. § 314.5 based on approved purchase price [the “**EDA Amount**”]); and **(ii)** any reasonable adjustment to the sale price as the result of building deficiencies, such as code violations, and public health, safety and welfare concerns, to make the building commercially marketable. The Buyer may be a for-profit entity or a nonprofit entity. 15 C.F.R. § 14.32 (c)(2).

A. Approval. If EDA approves the sale price, City shall convey the Parcel to the Buyer “AS IS” by Quit Claim Deed as soon as reasonably practicable – hopefully, prior to **February 28, 2015**. The Buyer will apportion the net purchase price due Seller/City at Closing, per the Closing Statement, between City for the City Amount and EDA for the EDA Amount. City shall provide EDA with a copy of the purchase and sale agreement (“**PASA**”) and a copy of the Closing Statement.

If the sale has not already been approved by the Milwaukee Common Council (“**Council**”) per the resolution approving this Agreement, the City’s sale to the Buyer per the PASA is also subject to Council approval under Milwaukee Code of Ordinances (“**MCO**”) 304-49.

The proceeds of an approved sale shall be distributed in the follow order of priority: **(i)** commercially reasonable sales commission, marketing and closing costs attributable to the seller (City); **(ii)** the City Amount; **(iii)** the EDA Amount; **(iv)** Surplus [defined below].

Prior to Closing, City shall provide to EDA a copy of the proposed Closing Statement and Deed, and EDA and City shall agree upon calculation of the EDA Amount.

If the net purchase price is not sufficient to pay both the City Amount and EDA Amount, City shall be entitled to priority payment with any overall shortfall then reducing the EDA Amount, with EDA then waiving deficiency as to the City.

Upon payment to the EDA of the EDA Amount, EDA agrees that it shall not require any recording in the ROD of any “Covenant of Use” against the Parcel under 13 C.F.R. § 314.10 (d)(2), and EDA shall consider its interest in the Parcel having been terminated, and terminated by the Wis. Stat. 75.521 tax foreclosure Judgment.

City shall provide EDA with prior notice of the time and place of Closing, and an EDA representative shall be permitted to attend Closing in EDA’s discretion. City shall promptly record the City-to-Buyer Deed with the ROD. Copies of Closing documents shall be provided to EDA. If an EDA representative does not attend Closing to accept payment of the EDA Amount, the City shall overnight deliver the payment of the EDA Amount to EDA, attention: Regional Director Jeannette Tamayo.

B. No Approval; No Closing. If EDA fails to approve the sale price, or if the Buyer fails to Close the transaction, or if the City Council has not approved City sale to the Buyer, City shall be permitted another opportunity to promptly issue another RFP and the

provisions of Section 2 above and Section 3A above (along with the preamble in Section 3) shall apply to that second RFP as well; providing, however, that (i) the second RFP shall be issued as soon as reasonably possible after the respective EDA failure to approve the sale price or Buyer failure to Close or Council failure to approve pertaining to the 1st RFP; and (ii) if requisite EDA approval of sale price and Council approval is secured for a Buyer from the 2nd RFP, the Closing shall take place as soon as reasonably possible.

If after the 2nd RFP, EDA fails to approve the sale price, or if the Buyer fails to Close the transaction, or if the City Council has not approved City sale to the Buyer, then at the option of either the City or EDA this Agreement shall terminate; and City shall promptly move the Milwaukee County Circuit Court to vacate the in rem property-tax foreclosure Judgment, thus restoring title to the Parcel to its pre-tax-foreclosure Judgment status. City shall provide notice to EDA of its motion and the Court's decision. Upon vacation of the Judgment by the Court, (i) City and EDA and Esperanza shall meet and confer, EDA understanding that City will not then be the owner, and that Esperanza will own with ownership duties, (ii) City's property taxes, interest and penalties (and any special charge or special assessment) shall continue to run and accrue, (iii) EDA shall consider whether to bring a mortgage-foreclosure action against the Parcel regarding the EDA Mortgage, and keep City apprised of its decision, and (iv) City and EDA retain their respective rights and defenses.

4. Surplus Funds. If the sale transaction closes, and after apportionment of the net purchase price per the Closing Statement with payment to City of the City Amount and payment to the EDA of the EDA Amount, there remain surplus funds (the "**Surplus**"), City shall identify and commit payment of the Surplus to a nonprofit entity operating community or economic development and/or job creation or skills-training programs in the City consistent with the intent of the Grant to provide workforce training and stimulate economic development in an economically distressed area of the City. City shall administer such funds in a manner consistent with its competitive procurement or competitive grant processes.

5. Right of Entry, Winterization Costs. While the City's tax-foreclosure case is pending, in addition to any right City has and retains under its police powers and code-enforcement powers, City shall present to Esperanza a proposed right-of-entry to allow City to inspect and to perform reasonable winterization of the Parcel as City determines in its reasonable discretion (which could include maintaining a minimum level of heat). With winter and cold temperatures, WE Energies warning of an impending utility cut-off due to nonpayment of bills, most of the Parcel being vacant and legally unoccupied due to placard orders and code violations, City will attempt interior access. Monies the City spends to secure and winterize (including heat and utilities) (herein collectively called "**Winterization Costs**") shall be recoverable by City at the Closing of the City's conveyance to the EDA-approved Buyer as part of the City Amount. City retains rights it has under applicable law to recover Winterization Costs in any event as a "special charge."

6. Facsimile and Counterparts. This Agreement may be executed in one or more counterparts which, when taken together, shall constitute one and the same document. Facsimile and PDF signatures shall be accepted as originals.

7. **Entire Agreement; Amendment.** This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof. The parties agree to abide by the terms in good faith. This Agreement may only be amended by a written agreement signed by all the parties hereto.

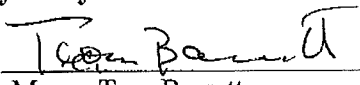
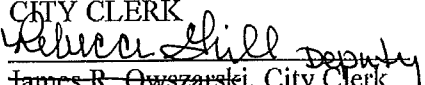
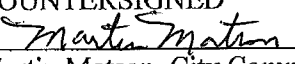
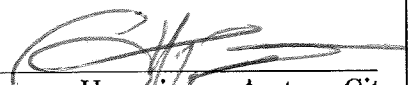
8. **Severable.** The terms and provisions of this Agreement are deemed separable and severable such that the invalidity or unenforceability of any term or provision shall not affect or impair the validity or enforceability of the remaining terms and provisions.

9. **Notices.** All notices permitted or required hereunder shall be considered given (i) upon receipt if hand-delivered by commercial courier or otherwise personally delivered, (ii) if sent by e-mail, then the notice must be sent during business hours on days that the City of Milwaukee's City Hall is open for business, and the notice shall be deemed given when sent as per the following and so long as the notice is successfully sent (i.e., the sender does not receive any error, or busy, or inability to send, notification), and (iii) within two business days of depositing same in the U.S. mail, postage-paid, addressed by name and address to the party intended as follows:

If to City Tom Barrett Mayor CITY OF MILWAUKEE 200 E. Wells Street, 2 nd Floor Milwaukee, WI 53202 Phone: 414-286-2200 Email: mayor@milwaukee.gov With a Copy to: Grant Langley City Attorney City Attorney's Office 849 N. Broadway, 7 th Floor Milwaukee, WI 53202 Phone: 414-286-2611 Email: glangl@milwaukee.gov Gregg Hagopian Assistant City Attorney City Attorney's Office 849 N. Broadway, 7 th Floor Milwaukee, WI 53202 Phone: 414-286-2620 Email: ghagop@milwaukee.gov	If to EDA Jeannette P. Tamayo Regional Director U.S. Dept. of Commerce – Economic Development Administration 111 N. Canal St., No. 855 Chicago, IL 60606 Phone: 312-353-8575, ex. 121 Email: jtamayo@eda.gov With a Copy to: Susan M. Brehm Regional Counsel U.S. Dept. of Commerce – Economic Development Administration 111 N. Canal St., No. 855 Chicago, IL 60606 Phone: 312-353-8143, ex. 127 Email: sbrehm@eda.gov <u>Steve Kong,</u> <u>Chief Counsel</u> U.S. Dept. of Commerce – Economic Development Administration 1401 Constitution Avenue, NW Suite 71004 Washington DC
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12. **Applicable Law.** With the exception of the City's rights and remedies pursuant to Wis. Stat. Ch. 75, Land Sold for Taxes, this Agreement shall be interpreted consistent with applicable Federal law, and if no applicable Federal Law, then the laws of the State of Wisconsin.

IN WITNESS WHEREOF, the parties caused this Agreement to be entered into and executed as of the Effective Date written above.

City: City of Milwaukee By: <u></u> Mayor Tom Barrett CITY CLERK <u></u> Deputy James R. Owszarski, City Clerk Rebecca Grill COUNTERSIGNED <u></u> ^{WS} Martin Matson, City Comptroller CITY ATTORNEY APPROVAL <u></u> Gregg Hagopian Asst. City Attorney Council Resolution: 141277	EDA: U.S. Dept. of Commerce - Economic Development Administration By: <u>See counterpart</u> Jeannette P. Tamayo EDA Regional Director, Chicago EDA Grants Officer
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