

STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
DOCKET NO.: _____

 CITY OF BURLINGTON,)
)
 Plaintiff,)
)
 v.)
)
 BTC MALL ASSOCIATES LLC,)
)
 Defendant.)

COPY

VERMONT SUPERIOR
COURT
SEP 8 2020
CHITTENDEN UNIT

COMPLAINT

The City of Burlington, by and through its attorneys Downs Rachlin Martin PLLC, alleges as follows.

INTRODUCTION

This is a Civil Action brought by the City of Burlington against BTC Mall Associates LLC (“BTC”) to vindicate its rights under the CityPlace Burlington Development Agreement. The City complains and alleges against BTC claims for breach of contract and breach of the implied covenant of good faith and fair dealing, and seeks declaratory relief under 12 V.S.A. § 4711 and injunctive relief in the form of specific performance.

As set forth herein, BTC’s breaches of the Development Agreement include, but are not limited to, failing to fund, construct, equip, and convey to the City the re-establishment of St. Paul Street, the re-establishment of Pine Street, and the activation of Bank and Cherry Streets and other additional public improvements; failing to adhere to the project schedule referenced in the Development Review Board approval, or use best efforts to adhere to the project schedule; failing to diligently continue construction of the City Place Project to completion; impermissibly

Downs Rachlin Martin PLLC seeking to unilaterally terminate the Development Agreement and abandon the Development

Agreement and the City Place Project through a letter from Mr. Donald F. Sinex dated September 3, 2020; and by purporting to abandon, withdraw, and relinquish the DRB approval/project schedule on September 3, 2020.

I. Parties

1. Plaintiff City of Burlington (the “City”) is a Vermont municipal corporation.
2. The City is the most populous municipality in the State of Vermont (“State”) and is the seat of Chittenden County, the most populous county in the State.
3. Upon information and belief, BTC is a foreign limited liability company organized under Delaware law and doing business in the State of Vermont. Its designated office business address is 350 N. Orleans Street, Suite 300, Chicago, IL, 60654.
4. Upon information and belief, BTC is a single-purpose entity whose sole member, at all relevant times, was/is RD Burlington Associates, LLC.
5. BTC is and, at all relevant times, was the owner of two parcels of real property located at (1) 49 Church Street, Burlington, Vermont, Parcel No. 044-4-00-004-000 which is improved with a retail shopping mall formerly known as “Burlington Town Center,” and (2) 75 Cherry Street, Burlington, Vermont, Parcel No. 044-4-033-000, which was improved with a parking garage (together, the “Property”).

II. Jurisdiction and Venue

6. This Court has jurisdiction over the subject matter of this original civil action pursuant to 4 V.S.A. § 31.
7. This Court has personal jurisdiction over BTC because this action arises out of BTC’s multiple breaches of its Development Agreement with the City which was executed in Vermont, which is governed by and construed in accordance with Vermont law, and which concerned the multi-purpose development of Property located in Chittenden County, Vermont.

BTC consented to and submitted to personal jurisdiction and venue in the State of Vermont, County of Chittenden, and therefore waived any objection to personal jurisdiction and venue with regard to any action related to the Development Agreement.

8. Venue is properly laid in this unit pursuant to 12 V.S.A. § 402 and for the reasons stated in paragraph 7, *supra*.

III. **Facts**

A. **The Burlington Town Center**

9. As the most populous municipality in the most populous county in the State of Vermont, the City offers many vibrant and unique attractions that benefit the region economically and culturally.

10. In particular, the City's historic downtown has long been, and remains, a popular destination for tourism, business conventions, cultural and civic events, as well as for the establishment of retail, dining, hospitality, and other businesses.

11. The Burlington Town Center mall opened in 1976 on the Church Street Marketplace under the name "Burlington Square Mall" in conjunction with 1960s-era urban renewal development in the City.

12. Several years after the Burlington Town Center mall opened, the Church Street Marketplace underwent a redesign and construction process and was converted into the uncovered outdoor pedestrian shopping and dining space that it remains today, consisting of the four City blocks of Church Street between Main Street to the south and Pearl Street to the north.

13. While the Burlington Town Center mall had originally expanded the retail base of the City's downtown, it had been a chronic underperformer economically for several years near the end of its fourth decade in operation.

14. The Burlington Town Center inhibited north-south movement by eliminating the north-south segments of St. Paul Street and Pine Street between Bank Street and Cherry Street and precluding the growth of vibrant street life on Bank Street and Cherry Street.

15. For these reasons, among others, the City undertook a multi-year community planning process known as “*planBTV – Downtown & Waterfront Master Plan*” (“PlanBTV”), which contemplated, among many other things, the redevelopment of the Property to restore connectivity of the urban grid, infill downtown development, and provide opportunities for active street-level retail and cafes. PlanBTV also included a diversity of housing choices to support several important community objectives.

16. In June 2013, the Burlington City Council (“City Council”) unanimously adopted PlanBTV, reflecting the City’s desire to have a walkable, connected, dense, compact, mixed-use and diverse urban center.

B. Proposed Redevelopment of the Burlington Town Center

17. In or about December 2013, Devonwood Investors, LLC, a New York-based private real estate investment firm (“Devonwood”), acquired control of the Burlington Town Center.

18. At that time, upon information and belief, Devonwood and Devonwood II Investors, LLC, together owned and controlled BTC, which, in turn, owned the Property.

19. Mr. Donald F. Sinex is and was, at all relevant times, the Managing Director of Devonwood.

20. Mr. Sinex’s stated desire was to redevelop the Property substantially in a manner that aligned with the vision set forth in PlanBTV. This proposed redevelopment came to be known as “CityPlace Burlington” or simply as “CityPlace.”

21. Pursuant to a resolution adopted by the City Council on or about December 14,

public input process with respect to the proposed redevelopment of the Property, and to work closely with technical consultants and BTC in connection with the redevelopment of the Property.

22. Over the next approximately 18 months, members of the City community had the opportunity to offer input and refine the proposal for redeveloping the Burlington Town Center, including in numerous public meetings.

23. On or about January 8, 2015, a “kick-off” meeting was held at City Hall to introduce this development agreement process and to solicit, receive, and incorporate public input regarding the community’s issues and concerns. A City webpage was established as a portal for public comment and project-related information. A community planning workshop followed on February 18-21, 2015. Additional follow-up presentations were made to the community highlighting the ways in which the proposed redevelopment responded to community feedback.

24. On May 5, 2015, Mr. Sinex presented revised plans at City Hall of what the redeveloped mall space would look like, together with representatives from PKSB Architects, the architectural firm hired by Devonwood.

25. During this time, BTC refined its designs, studied feasibility, and worked with the City to outline a framework for a development agreement.

26. At two separate events in January 2016, Mr. Sinex presented further revised plans to the public for redevelopment of the Property, which were prepared by PKSB Architects.

27. On or about April 20, 2016, the City and BTC released a pre-development agreement for the redevelopment of the Burlington Town Center mall (the “Pre-Development Agreement”).

28. On or about May 2, 2016, the City Council held a public forum in which members of the public provided input and expressed their views regarding the proposed redevelopment of the Property, after which the City Council approved the Pre-Development Agreement.

29. In September 2016, a market feasibility assessment was commissioned by BTC for the proposed Burlington Town Center redevelopment. The Doug Kennedy Advisors Feasibility Report, with proprietary information removed, states that the proposed redevelopment was “economically feasible and represents a viable investment for the developer” and “represents an opportunity to create a major mixed-use development in downtown Burlington that will greatly enhance the city’s downtown environment.” The ECONorthwest Feasibility Report commissioned by the City to review the Doug Kennedy Report summarizes the conclusion of the report as follows: “the project is economically feasible and represents a viable investment for the developer [BTC].”

C. Tax Increment Financing

30. In 1996, the City created a Tax Increment Financing (TIF) District known as the “Waterfront TIF District” along the central and northern end of the waterfront, which was subsequently expanded from the lakefront to Church Street along Cherry Street in order to facilitate increasing the housing supply and parking garage additions to help stimulate a market for commercial retail stores and business offices.

31. The Property is situated within the Waterfront TIF District.

32. Within the Waterfront TIF District, the City is authorized to issue debt (through general obligation bonds), invest the proceeds to construct or acquire infrastructure improvements that benefit the public and facilitate private investment, and utilize the incremental additional State and municipal tax generated by the improved private investment to pay the debt service on the bonds, all in accordance with applicable laws and regulations and following

approval by the Vermont Economic Progress Council, the City Council, and with the support of the voters (hereafter referred to as “TIF financing”).

33. Under TIF, the City can stimulate economic development by financing public improvement projects with the use of a property tax increment from the economic value that the projects create without increasing taxes.

34. Municipal debt issued within the Waterfront TIF District is repaid using the annual incremental increase in State and municipal property taxes generated by the real property located within the District over a baseline representing the amount of property taxes that were generated by the District at the time that the District was first established (the “increment”).

35. Pursuant to legislative acts in 2009 and 2013, the City’s borrowing period (i.e., the time within which the City must issue debt subject to the TIF provisions) for the Waterfront TIF District was extended to December 31, 2019. In 2016, the Vermont Legislature authorized an extension of the borrowing period for the Property to June 30, 2021.

36. The City’s ability to use the increment to pay municipal debt in the Waterfront TIF District extends through 2025, but with an extension to use the increment from the Property through June 30, 2035. That is, bonds issued generally under the Waterfront TIF District are amortized over a period ending in 2025, which specific legislative authority exists for bonds issued with respect to the Property to be amortized through 2035.

D. City Voters Amend the Zoning Ordinance and Approve TIF Financing

37. On or about September 29, 2016, the City Council approved an amendment to the City’s Zoning Ordinance that, among other provisions, allowed construction up to 160 feet on the Property. The City Council voted to place this amendment on the November 8, 2016 municipal ballot (“Question 3”) for the consideration of the voting public.

38. On or about September 29, 2016, the City Council also passed a resolution

if approved, would authorize the City Council to pledge the credit of the City to secure the repayment of indebtedness or make direct payments for the purpose of funding certain public improvements and related costs attributable to projects serving the Waterfront TIF District in a total principal amount not to exceed \$21,830,000.00 (the “Not to Exceed TIF Funding Amount”).

39. As set forth in Question 4, those public improvements included the acquisition of both Pine Street and St. Paul Street between Bank Street and Cherry Street (and related construction and streetscape improvements thereon), streetscape upgrades on Cherry Street and Bank Street, and the reimbursement for TIF-eligible related costs incurred by the City for the administration of the Waterfront TIF District.

40. On Election Day, November 8, 2016, City voters approved Question 3 and Question 4, and a subsequent lawsuit challenging the ballot question was dismissed by this Court in May 2017. *See Long et al. v. City of Burlington, et al.*, Docket No. 996-11-16 Cncv (May 19, 2017).

E. Development Review Board Approval

41. On or about December 15, 2016, Devonwood and PKSB Architects filed an application with the Burlington Development Review Board (“DRB”),¹ requesting a permit for the Project.

42. On or about March 17, 2017, the DRB unanimously approved the application (“DRB approval”). The DRB approval followed approvals from the City’s Conservation Board and Design Advisory Board earlier in 2017.

¹ BTC submitted a 51-sheet plan set to the DRB entitled “Burlington Town Center, Burlington, Vermont, Planning & Zoning Submission” prepared by PKSB Plus Architects, dated December 15, 2016 and last revised February 16, 2017, as supplemented by “Cellar Plan” Sheet A-050 last revised July 12, 2017, “Floor Plans 1-4th” Sheet A-051 last revised February 21, 2017, “Elevations – Bank Street & Pine Street” Sheet A-202 last revised July 12, 2017, and “Site Plan” Sheet C-103 last revised July 7, 2017 (collectively “the Plan Set”).

43. On or about April 11, 2017, Mr. Sinex announced that Devonwood had entered a joint venture agreement with Rouse Properties LLC (“Rouse”) to provide equity financing for the redevelopment. Mr. Sinex stated that Devonwood and Rouse would finance 30 to 40 percent of the project and that a construction lender would finance the remaining 60 to 70 percent.

44. As Mr. Sinex told *Seven Days*, the “important thing to announce to the community is the funds are in hand” and that the project was on track to break ground in “June or July” of 2017. See SEVEN DAYS, “Mall Company Pledges Financing for Burlington Town Center Project (Apr. 11, 2017), available at <https://www.sevendaysvt.com/OffMessage/archives/2017/04/11/mall-company-pledges-financing-for-burlington-town-center-project> (last accessed Sept. 8, 2020).

45. On or about May 19, 2017, the Vermont Superior Court, Civil Division dismissed a taxpayer suit challenging the validity of the TIF financing that had been approved by City voters.

46. On or about May 22, 2017, the Vermont Superior Court, Environmental Division denied a request to stay the DRB approval and any construction work. See *Devonwood Investors, LLC 75 Cherry Street*, Docket No. 39-4-17 Vtec (May 22, 2017 Decision on Motion to Stay).

47. In July 2017, Devonwood reached a mediated resolution with Burlington residents who had appealed the DRB approval. On July 17, 2017, the Vermont Superior Court, Environmental Division entered a Judgment Order modifying and supplementing the DRB approval.

48. In March 2018, a group of Burlington residents then filed suit in the United States District Court for the District of Vermont against the City, BTC, and Devonwood purporting to assert federal claims allegedly arising out of the permit amendments approved by the City’s

49. In December 2018, the Chief Judge of the District of Vermont dismissed the action and thereafter denied reconsideration of that decision.

F. The Development Agreement

50. On October 4, 2017, the City and BTC released a draft Development Agreement.

51. On October 16, 2017, the City Council passed a resolution authorizing the City to enter into the Development Agreement.

52. On October 26, 2017, the City and BTC (together, the “Parties”) entered into the Development Agreement. A true and correct copy of the Development Agreement is attached hereto as **Exhibit 1** and incorporated by reference.

53. The Development Agreement provided that the Parties had performed certain obligations required by the Pre-Development Agreement and that the Development Agreement was intended to replace the Pre-Development Agreement as the blueprint to guide the Parties’ construction and completion of the Project.

54. As set forth in the section of the Development Agreement entitled “Background,” the Project “contemplates the following features and characteristics (all numbers are approximations and may change due to final architectural and engineering requirements):”

- ±272 residential housing units (collectively measuring ±299,602 sq. ft.), including a mix of unit sizes and including both market rate and affordable (i.e., inclusionary) housing units.
- ±230,328 sq. ft. of Class A commercial office space.
- ±95,000 sq. ft. of first class retail space, designed to attract a mix of local, regional and national retailers, service providers, including a primary care medical facility, and restaurants (the “Retail Space”).
- ±28,062 sq. ft. that may either be used as retail space or which may be leased to a pre-school and early childhood development center tenant for the provision of childcare services.
- ±3,000 sq. ft. community space (the “Community Space”).

- A ±909 space parking garage (measuring ±385,551 sq. ft.), including the provision of covered long term bicycle parking facilities for 175 bicycles.
- Uncovered short term bicycle parking facilities for at least 100 bicycles.
- The re-establishment of St. Paul Street as a 60 foot-wide through, public street running between Bank Street and Cherry Street.
- The re-establishment of Pine Street as a 60 foot wide through, public street running between Bank Street and Cherry Street.
- The “activation” of the north side of Bank Street and the south side of Cherry Street between St. Paul Street and Pine Street, including (in both instances) a high level of street design including: sidewalks within the public ROW (but wider than those currently in place, to the extent that such additional width is possible); street trees; pavers; street lighting; storm water features, sub-surface utilities and infrastructure; and the creation of multiple entry points into the retail and other spaces within the Property from those streets.
- A rooftop observation deck to be made available to the public, subject to [BTC’s] reasonable rules and regulations and periodic, short-term closures for private rentals and events.

Exhibit 1 at 2, Background § E (defined terms in original).

55. The Development Agreement categorized the Project elements as either “Public Improvements” or “Private Improvements.” The “Public Improvements” are defined as the re-establishment of St. Paul Street, the re-establishment of Pine Street, and the activation of Bank and Cherry Streets (as more particularly described in the Development Agreement). The balance of the Project elements were defined as “Private Improvements.” *Id.* at 2-3.

56. Section 1 of the Development Agreement (entitled “Project Schedule”) provides, in pertinent part, as follows:

a. [BTC] desires to commence construction of the Project (including structural demolition of the Burlington Town Center mall) on or before October 15, 2017, or as soon thereafter as possible upon approval of this Agreement, timing being of the essence, and the City agrees to cooperate in good faith with [BTC] to facilitate [BTC’s] achievement of these objectives, subject to the conditions outlined in this Agreement, to join in any application to the State of Vermont for a public water supply infrastructure permit if the City’s involvement is required by the State of Vermont, and to join in any other permit application to the State of Vermont if the City’s involvement is required by the State of Vermont for such permit. Nothing herein shall preclude [BTC] from seeking permits to

revise the Project to add or modify uses of the Property in a manner consistent with the applicable zoning ordinance then in effect. [BTC] **agrees that once construction of the Project has commenced, [BTC] shall diligently prosecute construction to completion**, subject to any delays caused by a force majeure or other event outside the reasonable control of [BTC].

b. [BTC] anticipates completing the Project in accordance with the Project Schedule referenced in the DRB Approval, subject to force majeure events and the delay caused by the filing of an appeal to the DRB Approval, which was dismissed on July 17, 2017 by the Superior Court in the above-referenced Judgment Order (the “Project Schedule”), **provided that notwithstanding the schedule referenced in the DRB Approval, [BTC] plans to complete the Public Improvements in sufficient time to be eligible for reimbursement in accordance with Section 4 of this Agreement**. Each Party agrees to use best efforts to cause the Project to adhere to the Project Schedule....

Id. at 3, §§ 1(a)-(b) (emphasis supplied).

57. A true and correct copy of the pertinent excerpts of the Project Schedule is attached as **Exhibit 2**. The Project Schedule is divided into three distinct phases, with the third and final phase scheduled to be completed no later than August 1, 2020. Exhibit 2 at 12.

58. The Development Agreement further provided that in addition to the Public Improvements, to the extent there are sufficient funds available within the Not to Exceed TIF Funding Amount, the Project may include the “activation”² of additional sections of Bank Street and of Cherry Street (hereafter, the “Additional Public Improvements”).

59. Section 3(b) of the Development Agreement provides that:

[BTC] shall, subject to the application of the Public Improvements reimbursement provisions described in Section 4 of this Agreement, construct the Public Improvements as a component of the Project. . . .

Any Public Improvements or Additional Public Improvements to be constructed pursuant to this Agreement shall in all cases be subject to the reimbursement provisions of Section 4 of this Agreement.

² As used in the Development Agreement, “activation” of street sections means “to include a high level of street design including sidewalks within the public ROW (which may be wider than those currently in place), street trees, pavers, street lighting, storm water features, sub-surface utilities and infrastructure.” Exhibit 1 at 7, § 2(h).

Exhibit 1 at 8, § 3(b).

60. In Section 3(b), BTC agreed to construct the Public Improvements.

61. Also in Section 3(b), BTC agreed to provide the City with “reassurance that construction of the Project will continue without interruption (subject to force majeure events) once [BTC] commences structural demolition of existing improvements on the Property, prior to the commencement of structural demolition for the Project and the release by the City of the relevant structural demolition permit....” *Id.*

62. The reassurance required in Section 3(b) promised the City:

(i) the opportunity to review evidence of a commitment to extend fully-secured equity financing for the construction of the Project in an amount not to exceed \$56 million (such evidence will include, among other possible items, a copy of an executed agreement between [BTC] and Rouse Properties, Inc. confirming the obligation of Rouse Properties, Inc. or a wholly [owned] subsidiary thereof to fund equity for Project construction in an amount not to exceed \$56 million) together with evidence of the amount of equity financing expended to date (which shall mean a certification from [BTC] of the amount expended to date on predevelopment and development expenses for both the Private Improvements and the Public Improvements), (ii) either (a) an executed term sheet from a qualified lender evidencing construction loan financing for the Project, subject to closing conditions and requirements of the lender, or (b) a letter of assurance, reasonably acceptable to the City, issued to the City by Rouse Properties, Inc., or a wholly [owned] subsidiary thereof with GAAP net worth of at least \$750MM, stating that, subject to reasonable terms and conditions, the Project will commence construction in reliance on the equity commitment described above and that [BTC] will pursue closing of construction financing for the Project to be available to the Project not later than March 31, 2018, (iii) an executed construction contract that covers the performance of the structural demolition work, (iv) an executed construction contract that covers the performance of the site work, foundation work and soils work for the Project, and (v) an executed construction contract that covers the performance of construction, mechanical and electrical work to enable that portion of the existing Burlington Town Center mall building that will not be demolished to continue to function once structural demolition of the Project commences.

Id. at 8-9, § 3(b).

63. BTC also agreed that prior to commencing foundation work, it “shall provide the

City with a copy of an executed construction contract that contains a guaranteed maximum price

Downs
Rachlin to construct the Public improvements” and with “evidence that the obligation to construct the

Private Improvements is subject to a guaranteed maximum price contract that is secured by payment and performance bonds for the benefit of the construction lender, a completion guaranty for the benefit of the construction lender, or another customary and commercially reasonable form of financial surety reasonably satisfactory to the City.” *Id.* at 9, § 3(b).

64. Finally, BTC agreed that “the City will not have an adequate remedy at law for [BTC’s] noncompliance with the provisions of this Section 3(b) and, therefore, the City shall have the right to equitable remedies, such as, without limitation, injunctive relief and specific performance, to enforce the foregoing covenant and agreement.” *Id.* at 9, § 3(b).

65. Section 4(c) of the Development Agreement restates, for the third time, the obligation of BTC to fund and construct the Public Improvements and the Additional Public Improvements and addresses the conditions to reimbursement for the construction of the Public Improvements and Additional Public Improvements.

66. With respect to BTC’s obligation to fund and construct the Public Improvements and the Additional Public Improvements, subject to certain requirements and contingencies, Section 4(c) states:

[BTC] *shall* construct and equip the Public Improvements and any Additional Public Improvements in accordance with mutually agreed upon plans and specifications and in accordance with the Project Schedule.

[BTC] *shall* initially construct and equip the Public Improvements and any Additional Public Improvements (except for any Additional Public Improvements that the City agrees to construct itself in accordance with Section 2(h) of this Agreement) *at its own cost and expense*, and the City shall reimburse [BTC] for the agreed-upon cost of designing, constructing and equipping the Public Improvements and any Additional Public Improvements in the manner set forth in this Agreement, *subject only to the conditions stated below....*

The City acknowledges that [BTC] will construct the Public Improvements and any Additional Public Improvements in reliance upon the City’s agreement to reimburse [BTC] for the cost of designing, constructing and equipping the Public Improvements and any Additional Public Improvements in the manner described in this Agreement.

Id. at 20, § 4(c) (emphasis supplied).

67. Thus, the Development Agreement provided that BTC would construct and equip the Public Improvements and any Additional Public Improvements at its own cost and expense, and that the City would only reimburse BTC for those costs if BTC satisfied each of the conditions set forth in Section 4(c)(i)-(viii). Indeed, BTC explicitly acknowledged that in addition to other limitations, to be reimbursed for the hard and soft costs of constructing the equipping the Public Improvements, plus the costs of acquiring real property interests in St. Paul Street and Pine Street, BTC must “compl[y] with the statutory requirements and approvals required in this provision.” *Id.* at 20, § 4(a).

68. The conditions set forth in Section 4(c)(i)-(viii), each of which BTC was required to meet in order to be reimbursed (the “reimbursement conditions”), are as follows:

- i. City and [BTC] shall have agreed upon the plans and specifications with respect to constructing and equipping the Public Improvements and any Additional Public Improvements that are added to the Project. The Parties shall memorialize their agreement as to the final design and specifications by signing Final Design and Specification Sheets once the final designs have been agreed to by the Parties. The Parties shall use their best efforts to sign the Final Design and Specification Sheet for the new segments of Pine Street and St. Paul Street not later than March 31, 2018, and to sign the Final Design and Specification Sheet for all remaining Public Improvements not later than October 31, 2018, and to sign the Final Design and Specification Sheet for any Additional Public Improvements not later than March 31, 2019;
- ii. City and [BTC] shall have agreed upon the detailed Final Budget relative to the items for which reimbursement is sought, including the cost to design, construct and equip the Public Improvements, the cost to design, construct and equip any Additional Public Improvements that are added to the Project, the costs of acquiring real property interests in St. Paul Street and Pine Street, and together with other associated and related costs described in Question 4 of the November 8, 2016 municipal ballot;
- iii. The City shall have received completed monthly and annual reports with respect to items for which TIF funding is sought on forms to be provided to [BTC] by the City for such purposes in accordance with Section 3(c) of this Agreement. No other materials, forms or information shall be required of [BTC] as a condition to the reimbursement. The City shall notify [BTC] if any monthly report or annual report is not timely received by the City, in which case [BTC] shall file such report within thirty (30) days following receipt of such notice;

- iv. [BTC] shall have received a final Unified Certificate of Occupancy for the Project prior to June 30, 2021 unless the City agrees otherwise, as described in Section 4(d) of this Agreement. The City shall cooperate, use reasonable efforts and otherwise reasonably assist [BTC] in obtaining the Unified Certificate of Occupancy by the date specified;
- v. [BTC] shall have conveyed and the City shall have accepted the segments of St. Paul Street and Pine Street, together with the roadways, utilities and other improvements and infrastructure constructed therein and thereon, to the City in the manner required by Section 4(f);
- vi. [BTC] and the City shall have executed an agreement memorializing the terms of Section 4(d) in the form attached as Exhibit E; and
- vii. [BTC] shall have, by December 31, 2019, provided to the City, for submission to the Vermont Economic Progress Council, an executed construction contract and a completion guarantee evidencing [BTC's] commitment to construct not less than \$50,000,000 of private development on the Property, as described in Section 4(a) of this Agreement.
- viii. Solely with respect to any Additional Public Improvements that are not complete at the time that the Project is complete and the foregoing conditions (i) through (vii) have been satisfied, the City's obligation to reimburse [BTC] for the cost of designing and constructing such Additional Public Improvements shall be subject to satisfaction of the foregoing conditions (i), (ii) and (iii) with respect to such Additional Public Improvements, together with the City's receipt of: the certification from the Project engineer that such Additional Public Improvements were completed in accordance with the approved plans and specifications; as-built drawings in hard copy, AutoCAD and PDF formats; and all additional documentation prepared by the Project engineer with respect to such Additional Public Improvements including, without limitation, notes, photographs, reports, quality control testing reports, change orders, and submittals, as required by Section 3(c)(viii). For clarity, the City agrees that the City shall reimburse [BTC], in accordance with the terms of this Agreement, for all Work (other than any incomplete Additional Public Improvements) upon satisfaction of the conditions set forth in (i) through (vii) above, and thereafter, upon completion of such Additional Public Improvements, the City shall reimburse [BTC] in accordance with the terms of this Section 4(c)(viii).

Id. at 21-22, §§ 4(c)(i)-(viii).

69. BTC is required to satisfy each of the reimbursement conditions in Section 4(c)(i)-(viii).

70. Only upon satisfaction of the reimbursement conditions, is the City required to reimburse BTC for all cost that were agreed to and eligible for reimbursement, and if for any

reason the City failed to provide such reimbursement, then BTC was “not obligated to convey the sections of St. Paul Street and Pine Street together with the roadways, utilities and other improvements and infrastructure constructed therein and thereon . . . unless and until such time as the City reimburses [BTC] as required by this Agreement.” *Id.* at 22, § 4(c).

71. BTC also acknowledged and agreed that the amount of money that the City is able to pay for the Public Improvements is “limited by the obligation that the debt must be committed prior to June 30, 2021 (meaning, that BTC must receive a final Unified Certificate of Occupancy for the project prior to such date unless the City agrees otherwise) and by the obligation that the tax increment generated by the Private Improvements must be sufficient to service the debt incurred by the City to pay such costs.” *Id.* at 23, § 4(d).

72. The City, in turn, agreed to assess the Property and 101 Cherry Street using normal assessment procedure, provided that “if the City finds it necessary to ensure that the total tax increment generated by [the Project] is sufficient to pay the debt service on the municipal bonds issued to finance the City’s payments under this Section 4, the City shall establish the minimum assessed value of the Property upon completion of the Project so that sufficient tax increment is generated to pay the debt service on the municipal bonds[.]” *Id.*

73. The Development Agreement was executed by Mayor Miro Weinberger on behalf of the City.

74. The Development Agreement was executed by RD Burlington Associates, LLC—the sole member of BTC—by Mr. Brian Harper, in his capacity as CEO of RSE Burlington, LLC, the Managing Member of RD Burlington Associates, LLC; and by Mr. Sinex, in his capacity as Manager of BDM Associates, LLC, a Member of RD Burlington Associates, LLC.

G. The Rouse Letter of Assurance

75. On October 26, 2017, the CEO of Rouse, Mr. Brian Harper, issued a letter addressed to Mayor Weinberger, pursuant to the assurances requirement of Section 3(b) of the Development Agreement, as described in paragraph 62, *supra* (the “Rouse Letter”).

76. The Rouse Letter stated that as of December 31, 2016, Rouse had a GAAP net worth of “at least \$750,000,000,” and

has entered into a LLC joint venture agreement with BDM Associates, LLC, dated as of June 23, 2017 that requires Rouse, among other things, to invest equity in [BTC] that may be used to finance the construction of the Project. [BTC] plans to commence construction in reliance on the available equity financing. The available equity financing may be used by [BTC] as needed to fund construction until such time as [BTC] secures debt financing for the Project. The undersigned hereby confirms that [BTC] is pursuing debt financing for the construction of the Project, and confirms that [BTC] will continue to endeavor to obtain all construction financing for the Project so that it is available no later than March 31, 2018. Such construction financing for this Project shall be expressly subject to the terms and conditions specified by the individual lenders for this Project.

77. On August 18, 2020, in addressing the Section 3(b)-requirement that Rouse fund equity for the Project up to \$56 million, Rouse’s successor-in-interest stated that it had invested “**almost \$70 million**” in the development of the Project.

78. The City has not been provided with documentary evidence to support the statement that “almost 70 million” has been expended on the Project.

H. The Project Stalls

79. In reliance on the Rouse Letter, the City issued a demolition permit to BTC, and demolition began on the Project in or about November 2017.

80. Accordingly, BTC commenced construction, as defined by the Development Agreement to include structural demolition, in or about November 2017.

81. Mr. Sinex publicly stated: “It will take us 18 months to open the project from the time we start the structural demolition.” *See* WCAX.com, “Inside Burlington’s massive

downtown redevelopment project” (Nov. 17, 2017), *available at* <https://www.wcax.com/content/news/Inside-Burlingtons-massive-downtown-redevelopment-project-458313423.html> (last accessed Sept. 8, 2020).

82. Nevertheless, by the summer of 2018, it was clear that BTC would not deliver on Mr. Sinex’s statement to open the project within 18 months of beginning structural demolition in November 2017.

83. On or about August 28, 2018, the City (with the approval of the City Council) and BTC executed an amendment to the Development Agreement (the “Side Letter”) allowing BTC to commence foundation work before delivering executed GMP contracts to construct the Public Improvements and the balance of the Private Improvements. A true and correct copy of the Side Letter is attached hereto as **Exhibit 3** and incorporated by reference.

84. As the Side Letter reflects, BTC had “expressed to the City that it is prepared to enter into a guaranteed maximum price construction contract to construct the foundation for the Project and is ready to proceed with that work, but is not yet prepared to enter into a guaranteed maximum price construction contract to construct the balance of the Private Improvements.”

85. Notwithstanding the City’s willingness to enter into the Side Letter and provide these accommodations to BTC, BTC failed to continue construction and the Property has remained empty ever since.

86. On January 23, 2019, Chase Martin, a senior Vice President of Brookfield Property Group (“Brookfield”), successor-in-interest to Rouse, appeared before the City Council and stated that Brookfield was taking over day-to-day control of the Project from Mr. Sinex and Devonwood.

87. Mr. Martin told the City Council, “We think it is the perfect project for this market . . . and we think a project of this size, scale and magnitude is exactly what Burlington

On Track?” (Feb. 8, 2019), *available at* <https://www.vpr.org/post/will-international-developer-get-stalled-burlington-mall-project-track#stream/0> (last accessed Sept. 8, 2020).

88. At the time, the active involvement of an established real estate developer like Brookfield, with billions of dollars in assets under management and a proven track record of success, represented a welcome change from Devonwood’s stewardship of the Project.

89. Brookfield nevertheless did not continue construction of the Project as required under the Development Agreement.

90. On September 27, 2019, Mayor Weinberger wrote to BTC, notifying BTC that it was not in compliance with numerous obligations under the Development Agreement, including that BTC failed to continue construction of the Project following demolition of the mall and parking garage in contravention of the requirements in the Development Agreement that BTC diligently prosecute construction to completion.

91. Mayor Weinberger notified BTC that its construction delays “have endangered its ability to construct the Public Improvements in sufficient time to be eligible for reimbursement in accordance with the Development Agreement and in compliance with the statutory requirements applicable to the City’s expenditure of funds in the Waterfront TIF District[.]”

92. On October 28, 2019, Brookfield presented a preliminary, redesigned concept to the City Council. The tallest structure was to be 10 stories high, instead of 14. The redesigned concept included the addition of a 175-room hotel, and a substantial reduction in the amount of office space proposed. While repeatedly assuring the City of its intentions to re-start construction, Brookfield never did.

93. In November 2019, in an additional effort to salvage the ability to utilize TIF to facilitate the Project, the City submitted a Substantial Change Request to the Vermont Economic Progress Council (“VEPC”), the entity tasked with administering the State’s TIF financing

94. Writing in support of that Substantial Change Request in a letter dated November 22, 2019, BTC indicated that it “underst[ood] that in order for the City to be legally able to use Waterfront TIF District funds to pay for the construction of public improvements and related costs, the City must issue the debt instrument to pay for those costs no later than June 30, 2021, and the City cannot issue the debt instrument unless the redevelopment project is able to generate sufficient tax increment to service debt repayment consistent with the Section 4(d) of the Development Agreement.”

95. BTC further stated that “[b]ecause the project is being modified, we do not expect the redevelopment project to be completed and placed in service by June 30, 2021 to generate sufficient tax increment to service debt repayment in the ordinary course.” BTC nevertheless stated that it was committed to the generation of sufficient tax increment to service debt repayment, whether through the establishment of a minimum assessment or through another contractual method.

96. BTC reaffirmed its intent to submit to VEPC “an executed construction contract with a completion guarantee by the owner of the parcels evidencing commitment to construct not less than \$50 million of private development on the parcels.”

97. BTC further “anticipate[d] amending the Development Agreement to address an array of issues including, for example, agreeing on the cost and scope of public improvements that the project can support, revising the project schedule, revising the project program, and establishing the method by which the project will supply sufficient funds to service debt repayment, even if the City issues the debt instrument prior to project completion, in order to offer additional security to the City until the project is completed and placed in service.”

98. In January 2020 and February 2020, representatives from Brookfield, as well as its architect Freeman French Freeman, presented revised plans for “CityPlace 2.0” in multiple

public meetings, and assured the City and members of the public that it the Project would proceed.

99. In February 2020, the City drafted proposed amendments to the Development Agreement, in a good-faith effort to facilitate BTC's and Brookfield's professed desire to proceed with, and seek permit approval for, the revised redevelopment plans.

100. The City sent these proposed amendments to BTC in or about February 2020, and representatives of the City met personally with representatives from Brookfield to discuss them.

101. After the passage of several months without a response, in or about July 2020, the City received a redline from BTC rejecting the City's proposed amendments and proposing to remove terms from the existing Development Agreement.

102. To date, the Development Agreement has only been amended as set forth in the Side Letter. The Development Agreement as executed on October 26, 2017 remains binding on the parties and, and aside from the Side Letter, constitutes their entire agreement with respect to the subject matter therein. *See* Exhibit 1 at 35, ¶ 10 (Integration/Modification).

103. To date, BTC has not submitted an executed construction contract to VEPC or to the City.

104. At this time, design plans for the Public Improvements are substantially complete and "100% Drawings" have been prepared by BTC for the Pine Street and St. Paul Street segments.

105. In July 2020, the City learned that Brookfield intended to sell its interests in BTC back to Devonwood and return control of the Project to Mr. Sinex and Devonwood.

106. Brookfield did not tell the City how it intended to continue the assurances of sufficient equity financing that had had previously provided.

107. On July 18, 2020, the City sent BTC a notice of default identifying BTC's breaches of the Development Agreement and formally placing BTC on notice that the City was prepared to take legal action to enforce the City's rights under the Development Agreement.

108. On August 21, 2020, the City sent a final notice to BTC demanding that BTC, at its own cost and expense, construct and equip the Public Improvements and Additional Public Improvements, and convey unencumbered fee simple title to the segments of St. Paul Street and Pine Street, as it agreed it would do under the Development Agreement.

109. To date, the Property remains undeveloped in breach of the Development Agreement.

110. Despite completing structural demolition, BTC has failed to diligently prosecute construction to completion, in breach of the Development Agreement.

111. Despite its contractual obligations to do so, BTC has failed to fund, construct, equip, and convey to the City the Public Improvements and Additional Public Improvements required by the Development Agreement.

112. Nor has BTC conveyed unencumbered fee simple title to the segments of St. Paul Street and Pine Street that were to have been restored to the City under the Development Agreement.

113. BTC's failure to fund, construct, equip, and convey to the City the Public Improvements and the Additional Public Improvements, and BTC's failure to complete the Private Improvements, has deprived the City and the public of its bargained-for benefits under the Development Agreement.

114. The City has also been denied the benefit of the restoration of the public thoroughfares of St. Paul Street and Pine Street to the public as well as of the activation of Bank and Cherry Streets.

115. Demolition of the Burlington Town Center mall without timely construction of the Project has resulted in the absence of the vibrant and modern mixed-use development that BTC committed to build and that aligned with PlanBTV. It has also resulted in the City being deprived of approximately \$22 million in incremental tax revenue to support the Waterfront TIF District and other benefits that the City was projected to realize from residential and commercial tenants at CityPlace.

116. BTC's obligations to construct these Public Improvements and any Additional Public Improvements under the Development Agreement remain in full force and effect, regardless of whether BTC will or may ultimately complete the Project (including the Private Improvements), and/or satisfy the reimbursement conditions set forth in the Development Agreement.

117. On September 4, 2020, Mr. Sinex, on behalf of BTC, sent a letter (dated September 3, 2020) to Mayor Weinberger stating:

The Development Agreement dated October 26, 2017 between the City of Burlington and [BTC] has been mutually abandoned and terminated by the parties by virtue of the impossibility of performance, the parties' mutual abandonment of the project described therein and acknowledgement that it would not be constructed, their mutual inaction and waivers of performance by the other. In addition, **[BTC] has today formally abandoned, withdrawn, and relinquished the DRB Approval** as the term is defined in the Development Agreement....

*See Letter from Donald F. Sinex to Mayor Miro Weinberger (Sept. 3, 2020), attached as **Exhibit 4**, hereinafter (the "BTC's Notice of Abandonment") (emphasis supplied).*

118. BTC's Notice of Abandonment further claimed that BTC had not commenced construction of the Project and was, therefore, terminating the Development Agreement.

119. BTC has "commenced construction" within the meaning of the Development Agreement when it began structural demolition in late 2017.

120. BTC is prohibited under the terms of the Development Agreement from terminating the Development Agreement after BTC commenced construction of the Project, which it did in late 2017.

121. The City has not abandoned and/or terminated the Development Agreement or the Project.

122. Construction of the Project and performance of the Development Agreement is not impossible as that doctrine is defined by Vermont law.

123. The City has never “acknowledged that [the Project] would not be constructed[,]” and has repeatedly insisted on performance of the Development Agreement and progress on the Project from BTC.

124. The City has not waived performance of the Development Agreement either by its actions or in writing.

125. The Development Agreement contains a “Waiver” provision, which provides as follows: “The failure of either Party [the City or BTC] to insist on strict performance of any of the provisions of this Agreement or to exercise any right it grants **will not be construed as a relinquishment of any right or a waiver of any provision of this Agreement.** No waiver of any provision or right shall be valid unless it is in writing and signed by a duly authorized representative of the Party granting the waiver.” Exhibit 1 at 35, § 13 (emphasis supplied).

126. Also on September 4, 2020, BTC sent a letter to the Burlington DRB as follows:

Please be advised that [BTC], Devonwood Investors, LLC and their associated and affiliated entities (“BTC”) hereby abandon, withdraw and relinquish the submission to the Burlington Planning & Zoning Department for the Burlington Town Center project, as approved by the Burlington Development Review Board decision for File No. ZP17-0662CA/MA, dated March 7, 2017, as modified by the Judgment Order dated July 17, 2018 in the matter captioned *Devonwood Investors, LLC 75 Cherry Street*, Docket No 38-4-17 Vtec.

BTC looks forward to submitting a new project for approval in the near future.

See Letter from Donald F. Sinex to the Development Review Board (Sept. 3, 2020), attached as **Exhibit 5**.

127. Upon information and belief, BTC's Notice of Abandonment is BTC's response to the City's request that BTC comply with the Development Agreement and fund, construct, equip, and convey to the City the Public Improvements and any Additional Public Improvements.

128. Upon information and belief, the Notice of Abandonment was sent in bad faith, to coerce the City to negotiate a new Development Agreement.

COUNT I
(Breach of Contract)

129. The City repeats and re-alleges each allegation set forth in paragraphs 1 through 128 as if fully set forth herein.

130. The Development Agreement is a valid and enforceable contract between the City and BTC.

131. BTC agreed to be bound by the Development Agreement.

132. At all relevant times, the City has honored and performed its obligations to BTC under the Development Agreement.

133. BTC has breached the Development Agreement by failing to fund, construct, equip, and convey to the City the Public Improvements and any Additional Public Improvements and streets; failing to adhere to the Project Schedule or use best efforts to adhere to the Project Schedule; and failing to diligently continue construction of the Project to completion, as required by the Development Agreement.

134. BTC breached the Development Agreement on or about September 4, 2020 by

Downs
Rachlin impermissibly seeking to unilaterally terminate the Development Agreement; stating that it had
Martin PLLC

abandoned the Development Agreement and therefore would not be complying with its obligation therein; and by purporting to abandon, withdraw, and relinquish the DRB Approval/Project Schedule. BTC did not, and does not, have a legal excuse for breaching the Development Agreement.

135. BTC's breaches of the Development Agreement, including its failure to satisfy the reimbursement conditions, extinguishes BTC's ability to obtain reimbursement from the City for the Public Improvements and Additional Public Improvements, but not BTC's obligation to fund, construct, equip, and convey them.

136. BTC's breaches of the Development Agreement has caused cognizable harm to the City and denied the City the benefit of its bargain, as discussed herein.

COUNT II
(Breach of Implied Covenant of Good Faith and Fair Dealing)

137. The City repeats and re-alleges each allegation set forth in paragraphs 1 through 136 as if fully set forth herein.

138. The Development Agreement is an enforceable contract and is binding upon BTC.

139. Inherent in the Development Agreement is an implied covenant of good faith and fair dealing by the Parties.

140. BTC breached the Development Agreement's implied covenant of good faith and fair dealing by repeatedly failing to produce timeframes for completion of the Project and, when it furnished such timelines, repeatedly failing adhere to them, conduct which has deprived the City of its right to receive the benefit of its agreement.

141. BTC breached the Development Agreement's implied covenant of good faith and faith dealing by acting in bad faith and engaging in a course of conduct that was intended to deceive and mislead the City and which has deprived the City of its right to receive the benefit of its agreement.

142. BTC breached the Development Agreement's implied covenant of good faith and fair dealing on or about September 4, 2020 by impermissibly seeking to unilaterally terminate the Development Agreement; attempting to coerce the City to renegotiate the Development Agreement, stating that it had abandoned the Development Agreement and therefore would not be complying with its obligation therein; and by purporting to abandon, withdraw, and relinquish the DRB Approval/Project Schedule.

143. The City has been cognizably harmed by BTC's breaches of the Development Agreement's implied covenant of good faith and fair dealing.

COUNT III
(Specific Performance/Injunctive Relief)

144. The City repeats and re-alleges each allegation set forth in paragraphs 1 through 143 as if fully set forth herein.

145. For the reasons stated herein, BTC has breached the Development Agreement.

146. Had BTC performed its obligations under the contract, the City would have received the benefit of fully constructed and equipped Public Improvements and Additional Public Improvements and of the conveyance of unencumbered fee simple title to the previously eliminated segments of St. Paul Street and Pine Street.

147. Money damages will not furnish an adequate remedy to the City for BTC's breaches, including of Section 3(b) of the Development Agreement.

148. The segments of St. Paul Street and Pine Street are part of the Property and are presumed by law to be unique.

149. The re-establishment of St. Paul Street and Pine Street, as described in the Development Agreement, is necessary to restore connectivity of the City's urban grid and thereby better distribute traffic and create significant new opportunities for, among other things, redevelopment, economic vitality, and generation of new jobs and more visitors to the City.

150. The activation of Bank Street and Cherry Street is a necessary part of PlanBTV's strategic urban infill of this quadrant of the City in order to generate numerous opportunities for restoring retail and other activity to the street, redevelopment, economic vitality, and generation of new jobs and more visitors to the City.

151. It is not possible for the City with money damages alone to re-establish St. Paul Street and Pine Street, and activate Bank Street and Cherry Street, as required by the Development Agreement and to achieve the objectives of PlanBTV, discussed herein.

152. There is no alternative remedy for the City to the requested remedy of Specific Performance/Injunctive Relief.

153. Moreover, in entering the Development Agreement, BTC agreed that the City will not have an adequate remedy at law for BTC's noncompliance and, therefore, the City shall have the right to equitable remedies, such as, without limitation, injunctive relief and specific performance, to enforce the foregoing covenant and agreement.

154. The City is therefore entitled under the Development Agreement, and as a matter of equity, to injunctive relief from the Court order BTC to comply with its obligations under the Development Agreement.

155. Specifically, the City is entitled to a decree of specific performance, that BTC immediately fund, construct, and equip the Public Improvements and any Additional Public Improvements, without reimbursement from the City, and convey unencumbered fee simple title to the restored segments of St. Paul Street and Pine Street to the City.

COUNT IV
(DECLARATORY JUDGMENT THAT
THE DEVELOPMENT AGREEMENT IS ENFORCEABLE AGAINST BTC)

156. The City repeats and re-alleges each allegation set forth in paragraphs 1 through 155 as if fully set forth herein.

157. Vermont law narrowly applies the defense of impossibility of performance so that the impossibility “must consist in the nature of the thing to be done and not in the inability of the party to do it.” *Agway, Inc. v. Marotti*, 149 Vt. 191, 193, 540 A.2d 1044, 1046 (1988).

158. BTC’s compliance with the Development Agreement, including but not limited to construction of the Public Improvements, the Additional Public Improvements and the Private Improvements, is not impossible as that defense is defined by Vermont law.

159. The Development Agreement’s Waiver provision precludes BTC from arguing that either party abandoned, waived, or relinquished its right to enforce the Development Agreement. Exhibit 1 at 35, § 13.

160. Under the Development Agreement, “commenc[ing] construction” is defined to include structural demolition. *Id.* at 3, 8, § 1(a), 3(b).

161. The Development Agreement may only be terminated by BTC prior to commencing construction of the Project. *Id.* at 37, §19.

162. Because BTC commenced construction of the Project in 2017, it may not now seek to unilaterally terminate the Development Agreement by abandoning the DRB Approval.

163. Therefore, pursuant to 12 V.S.A. § 4711 the City requests a declaratory judgment confirming that the Development Agreement has not been abandoned or terminated, and remains binding and enforceable against BTC.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff the City of Burlington prays for relief as follows:

- A. Enter a judgment in favor of the City of Burlington and against BTC Mall Associates LLC, as set forth in the above Complaint;
- B. Enter a permanent injunction ordering BTC Mall Associates LLC to:
 - i. Immediately fund, construct, and equip the Public Improvements, at its own cost and expense;

- ii. Immediately fund, construct, and equip any Additional Public Improvements, as allowed by the Development Agreement, at its own cost and expense; and
- iii. Convey unencumbered fee simple title to the City for the segments of St. Paul Street and Pine Street.

C. Enter a Declaratory Judgment pursuant to 12 V.S.A. § 4711 that the Development Agreement is a binding and enforceable contract;

D. Award the City compensatory, consequential, incidental, and punitive damages in an amount to be determined at trial;

E. Award the City interest allowed by law, attorneys' fees, and costs of suit; and

F. Award the City such other and further relief as the Court may deem just and proper.

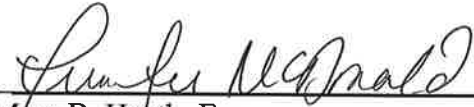
JURY DEMAND

Plaintiff the City of Burlington demands a jury trial on all issues so triable.

Burlington, Vermont.

September 8, 2020

DOWNS RACHLIN MARTIN PLLC

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ATTORNEYS FOR PLAINTIFF THE
CITY OF BURLINGTON

Development Agreement

This Development Agreement ("Agreement") is entered into as of October 26, 2017 by and between the **City of Burlington**, a Vermont municipal corporation (the "City") and **BTC Mall Associates LLC**, a Delaware limited liability company ("Owner"). Each is referred to individually as a "Party" and collectively as the "Parties."

Background

- A. Owner owns the real property numbered 49 Church Street, Burlington, Vermont, Parcel No. 044-4-004-000 which is improved with a retail shopping mall known as "Burlington Town Center", and the real property numbered 75 Cherry Street, Burlington, Vermont, Parcel No. 044-4-033-000, which is improved with a parking garage (together, the "Property").
- B. The Burlington Town Center mall opened in 1976 under the name "Burlington Square Mall" in conjunction with 1960s-era urban renewal development in the City of Burlington. While the existing mall originally expanded the retail base of the City's downtown, for several years it has been a chronic underperformer economically. The site is also a barrier to north-south connectivity, and has precluded the growth of a vibrant street life on Bank Street and Cherry Street.
- C. The City has undertaken a community planning process known as "*planBTV – Downtown & Waterfront Master Plan*" ("PlanBTV"), which contemplates the redevelopment of the Property in a manner that would utilize the Property more intensively in order to infill downtown development and provide more active street-level uses, would include a mix of affordable and market rate downtown housing, retail and services, and would also restore and/or improve connectivity to the urban grid along Pine Street and St. Paul Street.
- D. Owner desires to redevelop the Property substantially in a manner that the Owner and the City believe aligns with the vision set forth in PlanBTV, as described and depicted on the plans, drawings and other materials included within a 51 sheet plan set entitled "Burlington Town Center, Burlington, Vermont, Planning & Zoning Submission" prepared by PKSB Plus Architects, dated December 15, 2016 and last revised February 16, 2017, as supplemented by "Cellar Plan" Sheet A-050 last revised July 12, 2017, "Floor Plans 1-4th" Sheet A-051 last revised February 21, 2017, "Elevations – Bank Street & Pine Street" Sheet A-202 last revised July 12, 2017, and "Site Plan" Sheet C-103 last revised July 7, 2017, a copy of which is attached hereto as **Exhibit A** and made a part hereof (the "Plan Set"), which was approved by the Burlington Development Review Board by findings of fact and decision for File No. ZP17-0662CA/MA dated March 17, 2017, as modified by Judgment Order dated July 17, 2017 executed by the State of Vermont Superior Court, Environmental Division, in the matter captioned *Devonwood Investors, LLC 75 Cherry Street*, Docket No. 39-4-17 Vtec (such approval, as so modified and supplemented, is referred to herein as the "DRB Approval"), and such project, as approved in the DRB Approval, is referred to as the "Project").



FINAL VERSION

E. The Project contemplates the following features and characteristics (all numbers are approximations and may change due to final architectural and engineering requirements):

- ±272 residential housing units (collectively measuring ±299,602 sq. ft.), including a mix of unit sizes and including both market rate and affordable (i.e., inclusionary) housing units.
- ±230,328 sq. ft. of Class A commercial office space.
- ±95,000 sq. ft. of first class retail space, designed to attract a mix of local, regional and national retailers, service providers, including a primary care medical facility, and restaurants (the “Retail Space”).
- ±28,062 sq. ft. that may either be used as retail space or which may be leased to a pre-school and early childhood development center tenant for the provision of childcare services.
- ±3,000 sq. ft. community space (the “Community Space”).
- A ±909 space parking garage (measuring ±385,551sq. ft.), including the provision of covered long term bicycle parking facilities for 175 bicycles.
- Uncovered short term bicycle parking facilities for at least 100 bicycles.
- The re-establishment of St. Paul Street as a 60 foot-wide through, public street running between Bank Street and Cherry Street.
- The re-establishment of Pine Street as a 60 foot wide through, public street running between Bank Street and Cherry Street.
- The “activation” of the north side of Bank Street and the south side of Cherry Street between St. Paul Street and Pine Street, including (in both instances) a high level of street design including: sidewalks within the public ROW (but wider than those currently in place, to the extent that such additional width is possible); street trees; pavers; street lighting; storm water features, sub-surface utilities and infrastructure; and the creation of multiple entry points into the retail and other spaces within the Property from those streets.
- A rooftop observation deck to be made available to the public, subject to the Owner’s reasonable rules and regulations and periodic, short-term closures for private rentals and events.
- The re-establishment of St. Paul Street, the re-establishment of Pine Street, and the activation of Bank and Cherry Streets (all as more particularly described above and below) are collectively referred to in this Agreement as the “Public Improvements”, and the balance of the Project elements described in this Agreement are referred to as the “Private

FINAL VERSION

Improvements". The foregoing description of the Project Improvements is intended to outline the Project as approved by the DRB Approval. If there is a conflict between the foregoing description of the Private Improvements and the terms and conditions of the DRB Approval, the DRB Approval shall control.

- F. The Parties entered into a Pre-Development Agreement dated May 12, 2016 (the "PDA"), and both Parties have performed certain obligations required thereby, and this Agreement is intended to replace the PDA as the blueprint to guide the Parties' continued efforts to construct and complete the Project.

Now therefore, in consideration of the covenants, considerations and mutual benefits set forth herein, and other good and valuable consideration, the receipt and adequacy of which is hereby acknowledged, the City and Owner agree as follows:

1. Project Schedule.

a. The Owner desires to commence construction of the Project (including structural demolition of the Burlington Town Center mall) on or before October 15, 2017, or as soon thereafter as possible upon approval of this Agreement, timing being of the essence, and the City agrees to cooperate in good faith with Owner to facilitate Owner's achievement of these objectives, subject to the conditions outlined in this Agreement, to join in any application to the State of Vermont for a public water supply infrastructure permit if the City's involvement is required by the State of Vermont, and to join in any other permit application to the State of Vermont if the City's involvement is required by the State of Vermont for such permit. Nothing herein shall preclude Owner from seeking permits to revise the Project to add or modify uses of the Property in a manner consistent with the applicable zoning ordinance then in effect. The Owner agrees that once construction of the Project has commenced, Owner shall diligently prosecute construction to completion, subject to any delays caused by a force majeure or other event outside the reasonable control of the Owner.

b. Owner anticipates completing the Project in accordance with the Project Schedule referenced in the DRB Approval, subject to force majeure events and the delay caused by the filing of an appeal to the DRB Approval, which was dismissed on July 17, 2017 by the Superior Court in the above-referenced Judgment Order (the "Project Schedule"), provided that notwithstanding the schedule referenced in the DRB Approval, Owner plans to complete the Public Improvements in sufficient time to be eligible for reimbursement in accordance with Section 4 of this Agreement. Each Party agrees to use best efforts to cause the Project to adhere to the Project Schedule, with the understanding that each Party's ability to timely perform under this Agreement may be contingent on the other Party's timely performance, or on timely performance by one or more third parties (including, without limitation, independent political bodies of the City of Burlington) or processes over whom the Parties have no control.

2. Sustainability; Additional Project Features; Design Modifications; Community Resources; Parking and Transportation; Additional Public Improvements.

- a. Sustainability. In addition to incorporating the Public Improvements and Private

FINAL VERSION

Improvements substantially as described above, Owner agrees that: (i) the final plans and design for the Project will accommodate and support alternative forms of transportation, including the use of bicycles, car-sharing, mass transit and other measures, in the manner set forth in the Plan Set and approved by the DRB Approval; (ii) the final plans and design for the Project will include the installation of rooftop solar photovoltaic electric generation infrastructure in the manner set forth in the Plan Set and approved by the DRB Approval, subject to Owner's receipt of regulatory approval from the Vermont Public Utility Commission and to Owner's entry into a reasonably acceptable interconnection agreement with Burlington Electric Department; (iii) the Project will be built consistent with the requirements of ZA-16-14, Section 4.5.8(c)(6)(A), and will strive to achieve the energy reduction goals outlined in the "Architecture 2030 Challenge," to the extent applicable to new construction, and shall provide the City, upon written request from the City, with periodic updates regarding such efforts; (iv) Owner will work with Burlington City Arts on final plans and designs for public art installations in public spaces in the Project, and the final plans and design for the Project will incorporate City-approved public art installations that are reasonably satisfactory to the Owner and at no additional cost to Owner; (v) the final plans and design for the Project will incorporate accessibility features in accordance with applicable law, and will also use reasonable efforts to incorporate so-called "universal" design standards which, if implemented, would facilitate all-ages accessibility to the Project and which are consistent with the Project as approved by the DRB Approval; and (vi) Owner shall continue to participate in the City's district energy system ("DES") initiative by reasonably cooperating with Burlington Electric Department ("BED") and Corix Utility Systems (Washington) Inc. ("Corix") in the performance of due diligence described in the Memorandum of Understanding dated October 26, 2016 made by and between BED and Corix. The Parties acknowledge that the Owner has already committed to fund a pro rata portion of the due diligence process for the DES initiative and has participated as a lead sponsor in the DES initiative. Owner agrees that the Project will connect to the DES, and Owner shall participate as a customer of the DES, if the DES satisfies the following conditions:

1. The DES rate is competitive with the comprehensive business as usual cost of Owner's alternative heating options.
2. The DES contract grants to Owner a unique rate class based on its expected DES thermal energy consumption, and that such rate class receives pricing through rate design that acknowledges the Project's rate class would be most favored customer pricing among initial DES participants (defined as those participants connecting to DES within two (2) years after commissioning), other than UVM Medical Center.
3. The DES is compatible with the two-pipe system planned by the Owner in connection with the Project.
4. As part of the DES service, Corix provides a temporary solution acceptable to Owner for heating and, potentially, cooling for those portions of the Property that are not demolished in connection with the Project until such time as the DES is operational and available to Owner. Corix and Owner will include a provision in the DES contract to specify reasonable terms related to cost, buy back and residual value of the temporary heating solution if the DES does not proceed to completion and operation.

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5. The DES is backed by Corix or another credit-worthy guarantor that is reasonably satisfactory to the Owner, guarantying that if the DES is not operational and available to the Project by March 1, 2019, an adequate alternative interim heating solution will be provided to the Project. The Owner will be responsible for costs of thermal energy as outlined in the applicable Thermal Energy Services agreement, but the Owner shall bear no additional direct or indirect costs in connection with such interim heating solution.
6. BED provides all appropriate incentives available as of the date of this Agreement, or other appropriate incentives that become available after the date of this Agreement (but prior to July 1, 2019), to the Owner and/or the Property for energy efficiency generally, as well as fossil fuel reduction associated with the DES, and any other appropriate incentive that may be or become available to the Project, for the term of the DES contract.
7. The DES contract contains commercially reasonable and customary provisions acceptable to Owner.

Nothing herein shall require Owner to participate in the DES if any of the foregoing conditions have not been satisfied or if doing so would add cost to the Project, be inconsistent with permit conditions applicable to the Project, be technically incompatible with the Project, or cause delay to the Project. If the Project does not ultimately participate in the DES, the Owner will provide a letter to the City as to the reasons why the Project will not connect to the DES.

b. Housing. The Project as approved by the DRB Approval includes 272 residential housing units; however, the final unit count is subject to final construction drawings and approval of as-built design which may alter the unit count number. Owner intends to provide a mix of housing unit sizes, designs, and costs meant to attract a mix of tenants as contemplated in PlanBTV, and the DRB Approval requires that 20 percent of the total units, or 55 units if the Project includes 272 housing units, whichever is higher, shall be inclusionary units in conformity with the City's Inclusionary Zoning Ordinance ("Inclusionary Units"), comprised of the same mix of unit sizes as the market-rate units. Owner agrees that to the extent that Project amenities are made available to the residential units, they shall be equally available to both the market-rate and affordable units on the same terms and conditions. Owner intends to provide housing primarily as rental units but may offer some units for sale. Owner agrees to provide the City with an opportunity to review and comment on the unit design mix and the unit size mix for the residential component of the Project, as well as the unit location for the inclusionary housing units and the mix of rental and any ownership units, for conformity with the goals of PlanBTV, provided that Owner shall have complete discretion and shall retain final control over such issues. Nothing contained herein limits the availability of housing units in the Project for occupancy by individuals, including, without limitation, those who may be pursuing full or part time higher education, seniors or work force members.

c. Workforce Housing. In addition to the affordable, or inclusionary, housing to be included as a component of the Project, Owner shall endeavor to develop some "workforce

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housing” as part of the residential component of the Project, “workforce housing” being that which targets households with incomes between 80% to 120% of the median income for the Burlington/South Burlington MSA, adjusted for household size, and it being understood that these voluntary efforts on the part of the Owner shall create no new legal obligation to create or maintain such housing.

d. Low Income Housing Tax Credits. The City agrees to use its diligent, reasonable and good faith efforts to support Owner’s efforts to apply for and obtain finance subsidies and Low Income Housing Tax Credits that are normally available from either the State of Vermont or the U.S. government to qualified Vermont development projects that include Affordable Housing and/or Work Force Housing, such as that which this Project intends to offer.

e. Burlington Telecom. Owner agrees to afford Burlington Telecom the same opportunity to bid on the installation and provision of services to the Project as Owner affords to other providers of the services offered by Burlington Telecom. Owner agrees to use reasonable efforts to utilize Burlington Telecom residential and commercial services if such services are available to the Project on the time-line described herein and such services are available on terms and conditions that are competitive with other similar services on a commercial and residential basis and otherwise are satisfactory to the Owner.

f. Community Space and Rooftop Observation Space. Owner agrees to include the development of the Community Space as part of the Project. The Community Space shall be available for use by community and/or civic groups during normal business hours and pursuant to rules and regulations adopted by the Owner. The Parties agree that the Community Space may be located within an indoor portion of the rooftop observation deck. Otherwise the Owner shall locate the Community Space elsewhere on the Owner’s Property, as determined by the Owner in the Owner’s sole discretion. Owner will work with the City to determine how the Community Space will be designed and programmed. The City, acting through its Community and Economic Development Office (“CEDO”), will work with Owner to develop programs and uses for the Community Space that will optimize its use for the benefit of the residents of Burlington. The rooftop observation deck shall be generally open to the public daily during normal business hours except for those times when it has been used or rented for private events, shall be made available for use by non-profit and educational organizations at discounted rates, and shall include gender-neutral restrooms for use by the public during those times when it is open to the public. The use of the rooftop observation deck shall at all times be subject to the Owner’s rules and regulations, including those relating to fees and charges for its rental.

g. Parking and Transportation. Owner will work with Chittenden Area Transportation Management Association (CATMA) and Green Mountain Transit (“GMT”) to optimize the interplay between the transportation services that such organizations offer and the parking component of the Project. Owner shall install and implement parking garage safety measures including pervasive and adequate lighting subject to and consistent with Condition 2(c) of the DRB Approval, and a comprehensive security camera system that includes cameras at entry and exit points (including elevators) and in stairwells. Owner shall also install signage that reminds people not to leave valuables in vehicles. Parking garage stairways and elevators shall be well-lit and located where shown on the Plan Set.

h. Additional Public Improvements. In addition to the Public Improvements that are a part of the Project as permitted, and solely to the extent there are sufficient funds available within the Not to Exceed TIF Funding Amount described below in Section 4(b), the Project may include the “activation” of additional sections of Bank Street and of Cherry Street, which will be treated as “Additional Public Improvements” hereunder. Additional Public Improvements may be added to the Project in such order of priority as the City may determine. As used herein, “activation” of street sections means to include a high level of street design including sidewalks within the public ROW (which may be wider than those currently in place), street trees, pavers, street lighting, storm water features, sub-surface utilities and infrastructure. The additional street sections that may be activated as Additional Public Improvements include (1) the south side of Bank Street between St. Paul Street and Pine Street, (2) the north side of Cherry Street between St. Paul Street and Pine Street, (3) both sides of Bank Street between St. Paul Street and Church Street; (4) both sides of Cherry Street between St. Paul Street and Church Street; and (5) both sides of Cherry Street between Pine Street and Battery Street. To achieve a consistent and holistic design, the City will be responsible for conceptually designing the activation of both sides of Bank Street and both sides of Cherry Street between St. Paul Street and Pine Street (as described in Section 3(c)(i) below) even though the activation of the north side of Bank Street and the south side of Cherry Street are part of the Public Improvements and the activation of the south side of Bank Street and the north side of Cherry Street are Additional Public Improvements that may not be included in the Project. The Public Improvements and the potential Additional Public Improvements are depicted on **Exhibit B** attached hereto. In no event shall the addition or the contemplated addition of an Additional Public Improvement, or any action required in connection therewith, delay the schedule of the Project. Owner shall obtain and deliver to the City so-called Add Alternative pricing for each of the Additional Public Improvement elements described in this provision. If Owner constructs any Additional Public Improvements, then Owner’s obligation to include any Additional Public Improvement in the Project shall be subject at all times to the application of the reimbursement provisions described in Section 4. Because the Additional Public Improvements are all located within existing municipal rights of way, the City may choose to construct some or all of the Additional Public Improvements itself, using funds available within the Not to Exceed TIF Funding Amount or using other funding sources, in its discretion.

3. Public Improvements; Additional Public Improvements; Construction of Public Improvements and Additional Public Improvements; Municipal Zoning.

a. Although the new segments of St. Paul Street and Pine Street are covered by the DRB Approval, the Plan Set does not incorporate construction level plans and specifications. The Parties shall work together to develop satisfactory construction plans and specifications for the new street segments. The Parties agree that the new street segments shall feature a high level of street design including: wider sidewalks (where such wider sidewalks can be accommodated); street trees; pavers; street lighting; storm water features, sub-surface utilities and infrastructure; high quality benches, trash cans and other similar items of municipal property commonly found within sidewalks, all in substantial compliance with the standards identified on **Exhibit C** attached hereto and made a part hereof, as they may be modified by mutual agreement of the Parties, which are substantially compliant with the City’s “Great Streets” standards. Specifically, subject to the terms of this Agreement, the City may modify the plans and specifications as the Parties refine the

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Budget applicable to the Public Improvements, subject at all times to the application of the reimbursement provisions described in Section 4.

b. Owner shall, subject to the application of the Public Improvements reimbursement provisions described in Section 4 of this Agreement, construct the Public Improvements as a component of the Project. The DRB Approval includes approval for the construction of the new segments of Pine Street and St. Paul Street and for “activating” those sections of Bank Street and Cherry Street that adjoin the Property. Owner shall not be required to pay for any zoning permits, building permits or encumbrance permits to perform the work associated with “activating” any additional sections of Bank Street and Cherry Street (i.e., any Additional Public Improvements); however, Owner will be required to obtain encumbrance and/or excavation permits prior to performing any such work so that work within the public right-of-way will be properly regulated. In connection with the construction of any Additional Public Improvements, Owner shall not be charged any fee or be required to provide any insurance beyond what is required by this Agreement and if any such fees are required, then the City shall promptly reimburse the Owner for any fee paid by the Owner.

By December 31, 2017, the City shall provide the Owner with the design standards necessary for Owner to prepare construction plans and bid packages and develop a final budget for the new segments of Pine & St. Paul Streets; if the City fails to provide such standards by this deadline, such failure shall not delay Owner’s commencement of demolition or construction and Owner’s bid packages and final construction budget shall instead include an allowance for the construction of the new segments of Pine & St. Paul Streets. Any Public Improvements or Additional Public Improvements to be constructed pursuant to this Agreement shall in all cases be subject to the reimbursement provisions of Section 4 of this Agreement.

In order to provide the City with reassurance that construction of the Project will continue without interruption (subject to force majeure events) once Owner commences structural demolition of existing improvements on the Property, prior to the commencement of structural demolition for the Project and the release by the City of the relevant structural demolition permit (City agrees to release any interior, non-structural demolition permit that is required upon application by Owner), Owner shall provide the City with (i) the opportunity to review evidence of a commitment to extend fully-secured equity financing for the construction of the Project in an amount not to exceed \$56 million (such evidence will include, among other possible items, a copy of an executed agreement between the Owner and Rouse Properties, Inc. confirming the obligation of Rouse Properties, Inc. or a wholly subsidiary thereof to fund equity for Project construction in an amount not to exceed \$56 million) together with evidence of the amount of equity financing expended to date (which shall mean a certification from the Owner of the amount expended to date on predevelopment and development expenses for both the Private Improvements and the Public Improvements), (ii) either (a) an executed term sheet from a qualified lender evidencing construction loan financing for the Project, subject to closing conditions and requirements of the lender, or (b) a letter of assurance, reasonably acceptable to the City, issued to the City by Rouse Properties, Inc., or a wholly subsidiary thereof with GAAP net worth of at least \$750MM, stating that, subject to reasonable terms and conditions, the Project will commence construction in reliance on the equity commitment described above and that Owner will pursue closing of construction financing for the Project to be available to the Project not later than March 31, 2018, (iii) an

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executed construction contract that covers the performance of the structural demolition work, (iv) an executed construction contract that covers the performance of the site work, foundation work and soils work for the Project, and (v) an executed construction contract that covers the performance of construction, mechanical and electrical work to enable that portion of the existing Burlington Town Center mall building that will not be demolished to continue to function once structural demolition of the Project commences.

Owner agrees that prior to commencing foundation work for the construction of the Project, it shall provide the City with a copy of an executed construction contract that contains a guaranteed maximum price to construct the Public Improvements, consistent with the agreed upon Budget required by Section 3(c)(ii)(B) of this Agreement. The guaranteed maximum price contract shall include an allowance for (i) the Public Improvements and (ii) any Additional Public Improvements the City has proposed that the Owner will construct, all in an amount up to the Not to Exceed TIF Funding Amount, less any of the approved TIF Funding Amount the City has otherwise allocated to acquisition, related, or other TIF-eligible costs.

Prior to commencement of foundation work for construction of the Project, Owner shall provide the City with evidence that the obligation to construct the Private Improvements is subject to a guaranteed maximum price contract that is secured by payment and performance bonds for the benefit of the construction lender, a completion guaranty for the benefit of the construction lender, or another customary and commercially reasonable form of financial surety reasonably satisfactory to the City. Owner further agrees that 30 days prior to the commencement of construction of the Public Improvements and Additional Public Improvements, if applicable, Owner shall provide the City with a commercially reasonable performance guaranty (if the Additional Public Improvements are built in phases each separate phase will require its own performance guaranty). The Parties agree Owner's satisfaction of Condition 11 of the DRB Approval will fulfill this Agreement's performance guaranty requirements for the Public Improvements, and that with respect to any Additional Public Improvements that Owner undertakes to perform in accordance with this Agreement Owner may satisfy its obligation to provide the City with a performance guaranty by providing the City with a performance guaranty that is analogous to that provided to satisfy Condition 11 of the DRB Approval.

Owner agrees that the City will not have an adequate remedy at law for Owner's noncompliance with the provisions of this Section 3(b) and, therefore, the City shall have the right to equitable remedies, such as, without limitation, injunctive relief and specific performance, to enforce the foregoing covenant and agreement.

c. Design and Construction of Public Improvements and Additional Public Improvements. The following provisions shall apply to the design, development and construction of the Public Improvements and any Additional Public Improvements that become part of the Project; for purposes of this Section 3(c), the design, development and construction of Public Improvements and any Additional Public Improvements that become part of the Project are referred to as the "Work":

- i. Design. As stated above, by December 31, 2017, the City shall provide the Owner with the design standards necessary for the Work. The Owner shall

prepare construction plans and bid packages and develop a final budget for the new segments of St. Paul Street and Pine Street consistent with the design standards provided by the City. By July 1, 2018, the City shall provide, at its expense, conceptual designs (30% drawings) for the balance of the Work (meaning, other than for the new segments of St. Paul Street and Pine Street). Upon receipt of the conceptual designs (the 30% drawings), the Owner shall develop construction plans and bid packages and develop a final budget for such Work (meaning, all Work other than for the new segments of St. Paul Street and Pine Street) consistent with the conceptual design plans provided by the City. The Owner shall develop and deliver to the City the construction plans, bid packages and a final budget for any Work within a reasonable period of time and the City shall review and approve such materials promptly. City staff, employed by the executive branch of municipal government including by CEDO and DPW, shall be authorized to review and approve the design plans and specifications, construction plans, bid packages and budget contemplated by this Agreement.

ii. Bidding and Budget.

- A. Before putting bid packages together for any hard construction costs, City and Owner shall have agreed upon the plans and specifications with respect to the Work and they will memorialize their agreement as to the final design and specifications by signing a final design and specification sheet. No material deviations from the approved plans and specifications may be made without the written prior approval of the City. Owner shall notify the City in writing of any and all proposed changes in the plans and specifications and such changes must have the prior written approval of the City before they may be implemented, provided that the City shall act in a timely and reasonable manner with respect to any such changes proposed by the Owner.
- B. City and Owner have agreed upon a budget set forth in **Exhibit D** (the "Budget"). The Budget will be modified as agreed by the Parties, by amendment in writing, as plans and specifications for the Work are completed and agreed upon (the "Final Budget"), but in no event shall the Final Budget exceed the Not To Exceed TIF Funding Amount. The Final Budget shall include all costs for which Owner will be reimbursed by the City subject and pursuant to Section 4 of this Agreement, including all agreed-upon: design costs; predevelopment costs and expenses; financing expenses; demolition costs; hard construction costs; soft construction costs; construction management fees and costs; insurance expenses; permitting costs; legal fees; environmental remediation costs; costs to equip the Public Improvements and Additional Public Improvements; costs of commissioning and installing public art within municipal rights-of-

way; costs of acquiring property interests in St. Paul Street and Pine Street including the property rights of third parties who own adjacent properties or properties contiguous with the rights-of-way where the Public Improvements will be constructed; and the City's associated and related costs; subject to the understanding that the City can only legally reimburse TIF eligible expenses in accordance with applicable laws and regulations. The Parties recognize that as the Work may be designed and performed in phases in a manner agreed upon by the Parties (as described elsewhere in this Section 3), the Parties may prepare and/or agree upon a Budget and a Final Budget for just those specific phases, before a Budget and Final Budget covering all aggregate Work has been prepared/completed. Accordingly, although the Budget and Final Budget contemplated by this Agreement refer to the overall budget for the Work, as appropriate given the context, the terms Budget and Final Budget may be construed to refer to particular phases of the Work.

- C. The project contingency included in the Budget and in the Final Budget shall not exceed 15% of the direct cost to construct the Work.
- D. In bidding the Work, Owner shall obtain at least three bids from unrelated contractors for each element of the Work (unless the City agrees otherwise), isolate those costs for which Owner intends to seek reimbursement from the City and require quantity and unit costs to facilitate the Parties' ability to determine whether such costs are properly reimbursable in accordance with this Agreement.
- E. Owner shall provide the City with all of the bids submitted from all contractors and subcontractors for the City's review and approval prior to accepting any particular bid. All bids selected will be mutually agreeable. If Owner desires to accept a bid that was not submitted by the lowest bidder, Owner shall provide the City with a written explanation for its preference.
- F. If Owner's general contractor intends to perform any Work using its own forces without bidding such Work, then the cost to perform Work using the general contractor's own forces must be within 5% of the estimate provided to the City by DuBois & King, Inc. dated September 15, 2016 to perform such Work or within 5% of the amount stated in the Final Budget to perform such Work.
- G. The City shall have the right to have a third party review any of the bids at its expense, provided that such review does not delay the Project and the City shall not be entitled to reject any bid that is equal to or less than the amount reflected in the Budget (as it may be modified from time to time by agreement of the Parties as

contemplated by Section 3(c)(ii)(B)) for the work covered by such bid.

- H. The Parties will use the winning bids to develop and refine the Final Budget for the Work.
- I. The City reserves the right to modify the plans and specifications that describe the Work and adjust the scope of the Work in response to the bids so long as the City obtains any amendments of the DRB Approval necessitated by such modifications at its expense and such modifications do not delay the Project timeline or otherwise increase the unreimbursed costs of the Project to Owner and such modifications do not increase the cost of the Work to an amount that exceeds the TIF Not to Exceed Amount less any of the approved TIF Funding Amount the City has otherwise allocated to acquisition, related, or other TIF-eligible costs.

iii. Pre-Construction.

- A. Once the construction plans and specifications have been finalized for the Work, the City and its Agents, Owner and Owner's general contractor and, where appropriate, relevant subcontractors shall attend a pre-construction meeting to review the construction plans and specifications for the Work and agree upon the schedule for construction of the Work, to:
 - 1. specify what constitutes material versus non-material changes in the Work;
 - 2. specify the approval process that the City will require for material changes in the Work; and
 - 3. clarify the City's process for TIF administration including identifying which costs are eligible for TIF reimbursement, what back-up will be required prior to payment and what information must be provided in Owner's request for reimbursement.

Owner shall invite the City to attend the pre-construction meeting to discuss the demolition and site preparation work at least three (3) business days prior to starting structural demolition of existing improvements. Demolition can begin no sooner than five (5) business days following the pre-construction meeting.

iv. Construction.

- A. Owner shall not commence construction (for purposes of this paragraph, commencement of construction shall not be construed to

include demolition) of any Work until the City shall have approved the plans and specifications for such Work in writing in the manner described in Section 3(c), which approval shall not be unreasonably withheld or delayed.

- B. No material deviations from the approved plans and specifications may be made without the written prior approval of the City.
 - C. Owner shall notify the City in writing of any and all proposed changes in the plans and specifications for any Work and the City shall notify Owner within three (3) business days in writing as to whether any such proposed changes have been approved, not approved, or whether the City reasonably requires a specified number of additional days to review the proposed changes. Failure to provide such notice within three (3) business days, or within such specified number of additional days, shall be deemed to be approval by the City.
 - D. Owner may start construction of the Private Improvements before the Work or the approval of the final plans for the Work by the City, consistent with this Agreement. Similarly, as stated above the Work may be performed in phases.
- v. Construction Meetings and Inspections.
- A. Weekly throughout the construction process Owner and Owner's general contractor shall invite the City and its agents to attend construction meetings to the extent that such meetings are concerned with or relate to the construction of the Work.
 - B. Weekly throughout the construction process, Owner and Owner's general contractor shall afford the City and its agents with full and complete access to the Work so that the City and its agents have the opportunity to effectively inspect the Work during business hours and before work is covered to determine whether the Work is being constructed in accordance with the approved plans and specifications.
 - C. The City's inspection representative(s) will be provided a heated workspace with access to data services in a job trailer or some other onsite location or a nearby offsite location, within one block of the project site, if Owner and the Owner's general contractor hold such meetings in such offsite location.
 - D. The Owner shall obtain the services of a Vermont licensed engineer, reasonably acceptable to the City, responsible to properly document and certify that the Work completed conforms with the bid

documents and construction plans and specifications, as amended and approved by the Parties.

- E. The City's inspection representative(s) will be provided daily field notes that relate to the Work from the contractor's engineer within 3 business days of receipt of such reports by Owner.
- F. Owner will provide submittals, requests for information (RFI) and correspondence regarding any Work to the City's inspection representative(s). Owner agrees the inspections, reports, advice, or recommendations provided to the City by its agents or inspectors is solely for the City's benefit and that Owner may not rely on the reports, advice, or recommendations made to the City by the City's agents or inspectors and that the City shall have no liability or duty to the Owner on account of the reports, advice, or recommendations produced by its agents or inspectors. Notwithstanding, the City agrees to provide the Owner with a copy of each inspection report concerning the Work prepared by the City's agents or inspectors within 3 business days of receipt of such reports by the City.
- G. Owner shall provide the City and its agents with Owner's inspection reports and Owner's materials testing inspection reports relating to the Work prepared by engineers and other professionals who are licensed, certified or otherwise qualified to make such reports, which reports shall be addressed to the City (meaning that the City will be an addressee of such reports) and the City will be entitled to rely thereon.
- H. Without limitation, Owner's testing agency reports and construction materials testing reports shall include such sampling and testing as may be required by the VTrans Material Sampling and Testing Manual, including without limitation the obligation to certify proper placement and compaction, and to verify that structural soils meet specifications.
- I. Owner shall provide the City with contractor submittals, including any certifications required for the funding source, for review and approval within three (3) business days after receipt for any of the Work prior to the Work being initiated. Should materials be used before they are approved they will not be eligible for reimbursement if they are inconsistent with the approved construction plans and specifications for the Work.
- J. Owner shall direct its engineers and other licensed professionals to provide the City with all third party inspection reports related to the Work at the same time as they are submitted to Owner or Owner's

representatives or agents.

- K. If the City determines it necessary to hire its own third party inspector(s), it will be at the City's expense and the City's inspector(s) will be allowed to perform testing and take samples as they deem necessary or desirable during normal business hours. Any such inspection activities shall be insured with such types and coverage amounts of insurance as are required for Owner and Owner's contractors pursuant to subsection (ix) below and, prior to entering the construction site, and shall provide the Owner with proof of such insurance. Any such insurance policies shall name the Owner and Owner's representatives as additional insureds.

vi. Inspection Disputes.

- A. If, upon its inspection of the Work, City reasonably believes there is any material deviation in the construction of the Work from what is required by the approved plans and specifications, the City shall provide written notice thereof to Owner within seventy-two (72) hours of the inspection identifying the specific deviations.
- B. Within seventy-two (72) hours of Owner's receipt of the City's notice, Owner shall either commence to correct the deviations and diligently prosecute such corrections to completion, or shall provide the City with written notice as to why correction is not necessary.
- C. Any dispute concerning the Work shall be resolved in accordance with the following procedure: Claims must be evaluated first by the City Engineer and then by the Director of Public Works. Should a claim be ruled in favor of the Owner, it will be allowed, in whole or in part, and paid as provided herein. Should a claim be denied in whole or in part by the Director of Public Works the Owner may appeal to the City of Burlington's Chief Administrative Officer. Should a claim be denied in whole or in part by the City of Burlington's Chief Administrative Officer, the Owner may pursue any remedy available at law or in equity.

vii. TIF Administration – Monthly and Annual Reporting.

- A. To facilitate the City's ability to promptly reimburse Owner for the budgeted, agreed upon costs of performing the Work at its conclusion in accordance with Section 4 of this Agreement, quarterly (each quarterly report to be organized by month) throughout the performance of the Work Owner shall provide the City with a spreadsheet that itemizes the amounts invoiced by each contractor and subcontractor together with invoice numbers, the dates of work

covered by the invoices and brief descriptions of the work performed by each contractor and subcontractor, together with copies of:

1. requisitions submitted by contractors and subcontractors for performance of the Work that describe the Work performed;
 2. evidence that the Work for which payment was requisitioned has been inspected and accepted under the inspection process outlined above; and
 3. evidence of payment that corresponds to the amount requisitioned.
- B. The City shall review the materials provided by Owner each month to confirm that the Work performed and the amount paid by Owner for the Work corresponds to the budgeted cost of the Work. If the City determines that the Work performed and the amount paid for the Work does not correspond to the budgeted cost of the Work, then it shall notify Owner of such determination within thirty (30) days after its receipt of Owner's submission, and the Parties shall work together in good faith to resolve the matter to their mutual satisfaction.
- C. To facilitate the City's ability to promptly reimburse Owner for the budgeted, agreed upon costs of performing the Work at its conclusion in accordance with the Development Agreement, **annually (meaning prior to June 30 of each year)** throughout the performance of the Work Owner shall provide the City with annual reports with respect to items for which TIF funding is sought on forms provided by the City for such purposes, together with the back-up information and materials in the form specified by the City during the pre-construction and construction meeting process outlined above which the City must receive in order to expend TIF funds in compliance with applicable laws, rules and regulations, which information and materials must comply in form and substance with the requirements and rules of the Vermont Economic Progress Council as they may be amended from time to time.
- D. In accordance with the requirements established by the Vermont Economic Progress Council, the annual reports must include information regarding the number and types of jobs - both construction and new permanent jobs - created by the Work and by the completed Project using the North American Industry Classification System (NAICS) three digit code, organized by the number of jobs created per sector per fiscal year.
- viii. Certification and Completion. After the Work has been completed and accepted by the City (A) in the manner specified in the DRB Approval to the extent that such Work is covered by the DRB Approval and (B) to the extent that such Work is not covered by the DRB Approval, Owner shall provide

the City with: a certification from the Project engineer that the Work was completed in accordance with the approved plans and specification; as-built drawings in hard copy, AutoCAD and PDF formats; and all additional documentation prepared by the Project engineer with respect to the Work including, without limitation, notes, photographs, reports, quality control testing reports, change orders, and submittals.

ix. Insurance.

A. Liability Insurance. Throughout the performance of the Work, Owner agrees that Owner and Owner's general contractor shall obtain and maintain:

1. workers' compensation, disability benefit and other similar employee benefit acts as required by applicable law;
2. Commercial Auto Liability insurance on all owned, non-owned and hired automobiles with a minimum combined limit of not less than Two Million Dollars (\$2,000,000) per occurrence; and
3. Commercial General Liability Insurance covering Bodily Injury, Personal/Advertising Injury, Broad Form Property Damage, Products and Completed Operations Liability and Contractual Liability with limits of at least \$5,000,000 Combined Single Limit for each occurrence, to insure against all legal liability for personal injury (including death) and property damage suffered on or about the Property or in the vicinity thereof (including within the adjacent public rights of way that will be under Owner's control pursuant to encumbrance permits issued for the Project) or as a result of the exercise of rights granted pursuant to this Agreement.

B. Professional Liability Insurance. Owner's general contractor and design professionals who prepare the final plans and specifications related to the Work shall carry a professional liability policy of errors and omissions insurance of at least \$2 million which names the City as an additional insured to the extent commercially available under customary practice, and Owner shall provide the City with certificates of insurance evidencing such coverage prior to the commencement of construction of the Work. If meeting such requirements would pose a hardship to any of Owner's design professionals, then the marginal cost of increasing such design professional's errors and omissions insurance coverage from \$1 million to \$2 million may be added to the cost of the Work as a TIF-reimbursable item by agreement of the Parties.

C. All insurance shall be obtained from an insurer licensed in Vermont

having an A.M. Best Rating of at least A-, financial size category VII or greater.

- D. Owner shall seek to add the City as an additional insured on a primary non-contributory basis for any insurance policies with respect to the Work identified in this section (ix), to the extent that the City has an insurable interest. In addition, the liability policies and workers' compensation policies shall include a waiver of subrogation in favor of the City for all policies where the City is listed as additionally insured in the manner required by the previous sentence. The City agrees to pay for any incremental additional cost associated with obtaining such waiver of subrogation.
- E. Owner agrees that the insurance referenced in this section (ix) specify that the coverage to benefit the City shall be primary over any insurance maintained by the City. The City agrees to pay for any incremental additional cost associated with having the coverage specify that the coverage to benefit the City shall be primary over any insurance maintained by the City.
- F. Owner shall provide the City with certificates of insurance evidencing such coverages prior to the commencement of construction of the Work and annually upon the renewal thereof until certification and completion of the Work in accordance with subsection (viii) above.
- G. All certificates shall contain a provision stating that the coverages afforded under said policies will not be cancelled, materially changed or not renewed without at least thirty (30) days written prior notice to the City.
- H. Owner shall, at its own expense, pay all deductibles in connection with its insurance coverage. Nothing herein shall preclude the Owner from insuring the Project under an OCIP plan of insurance so long as the OCIP plan meets the coverage requirements set forth in this section.
- x. Liability. Owner agrees to be liable for the acts of its contractors, agents, and employees in connection with the construction of the Project. City agrees to be liable for the acts of its contractors, agents, and employees in connection with its inspection of Project construction.
- d. Design and Construction of Additional Public Improvements. The City will be responsible, at its expense, for preparing conceptual design plans (30% drawings) for any Additional Public Improvements that it desires to add to the Project. The City anticipates that it will accomplish the foregoing by July 1, 2018. Owner agrees

that so long as the City delivers the work product described above within the targeted time frame (July 1, 2018), then adding Additional Public Improvements to the Project will not delay the Project timeline or construction schedule. The Parties acknowledge that the construction of street and sidewalk improvements are scheduled for late in the construction schedule, and they agree that there are efficiencies to be gained by adding Additional Public Improvements to the Project so that the work is performed using Owner's contractors while Owner's contractors are mobilized at the Property, but only so long as the addition of Additional Public Improvements to the Project will not delay the Project timeline or construction schedule. Accordingly, even if the City fails to deliver the work product described above within the targeted time frame, then Owner will add Additional Public Improvements to the Project so long as the addition will not in fact delay the Project timeline or construction schedule. If the City however fails to deliver the work product by the prescribed date and if the Project will be delayed if Owner constructs all of the tardy Additional Public Improvements in the Owner's reasonable judgment, then Owner shall have no further obligation to construct those Additional Public Improvements that were tardy and would result in delay. If any Additional Public Improvements are added to the Project, then the terms and provisions of Section 3(c) of this Agreement shall apply to the construction of those Additional Public Improvements in the same manner as they apply to the construction of the Public Improvements. Any Additional Public Improvements added to the Project shall be constructed by the Owner in reliance on the obligation of the City to reimburse the Owner for all eligible costs incurred in constructing the Additional Public Improvements, and Owner's obligation to include and construct such Additional Public Improvements shall be limited to the amount of TIF funds that the City reasonably estimates will be available from the TIF amount generated from the incremental value of the Private Improvements. In furtherance thereof, in no event shall Additional Public Improvements be included in the Work until the City, in consultation with the Owner, has reasonably determined that sufficient TIF proceeds are likely to be generated from the incremental value of the Private Improvements or the City has otherwise agreed to fund the cost of such Additional Public Improvements from other sources.

4. Waterfront TIF District; Payment for Public Improvements.

a. Waterfront TIF District. The Property is situated within the City of Burlington's Waterfront Tax Increment Financing District (the "Waterfront TIF District"), within which the City is authorized to invest public funds to construct or acquire infrastructure improvements that facilitate private investment, all in accordance with applicable laws and regulations and following approval by the Vermont Economic Progress Council, by the Burlington City Council and with the support of the voters via a public referendum. Municipal debt incurred within the Waterfront TIF District is repaid using the incremental increase in property taxes generated by the real property located within the District over the property taxes that were generated by the District at the time that the District was first established, all as more particularly set forth and described in the laws and regulations by which the District was established and is now governed. The Vermont Legislature has authorized the City to extend the period to retain municipal and education tax

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increment for the Property until June 30, 2035 as long as Owner shall have, by December 31, 2019, provided to the City, for submission to the Vermont Economic Progress Council, an executed construction contract and a completion guarantee evidencing Owner's commitment to construct not less than \$50,000,000 of private development on the Property. Owner acknowledges that in addition to any other limitations set forth and described in this Agreement, the City's ability to reimburse Owner for the hard and soft costs of constructing and equipping the Public Improvements, plus the costs of acquiring real property interests in St. Paul Street and Pine Street (as further described below) is dependent on Owner's compliance with the statutory requirements and approvals required in this provision.

b. Not to Exceed TIF Funding Amount. On November 8, 2016, the voters of the City of Burlington authorized the City Council to pledge the credit of the City to secure the repayment of indebtedness or make direct payment for the purpose of funding certain public improvements and related costs serving the Waterfront TIF District in an amount not to exceed \$21,830,000.00 (the "Not to Exceed TIF Funding Amount") as described more particularly in Question 4 of the November 8, 2016 municipal ballot. The City desires and intends to use such funds to pay costs included in the Final Budget (as defined in Section 3(c)). As the Project moves through the design development process and more detailed construction drawings are developed, the Parties may modify the design of the Public Improvements and may add Additional Public Improvements described in Paragraph 2(h) to the Project (provided that there are sufficient funds available within the Not to Exceed TIF Funding Amount), and the Parties shall refine the Budget to determine if the costs of the Public Improvements (and the amount of the Not to Exceed TIF Funding Amount to be spent on the Public Improvements or other related costs) should be adjusted prior to finalization. City staff, employed by the executive branch of municipal government including by CEDO and DPW, shall be authorized to review and approve the Budget as it may be modified and refined upon agreement of the Parties as detailed construction drawings and specifications are prepared.

c. Payment for Construction of Public Improvements and Additional Public Improvements. Subject to the requirements and contingencies set forth in this Agreement, Owner shall construct and equip the Public Improvements and any Additional Public Improvements in accordance with mutually agreed upon plans and specifications and in accordance with the Project Schedule. Owner shall initially construct and equip the Public Improvements and any Additional Public Improvements (except for any Additional Public Improvements that the City agrees to construct itself in accordance with Section 2(h) of this Agreement) at its own cost and expense, and the City shall reimburse Owner for the agreed-upon cost of designing, constructing and equipping the Public Improvements and any Additional Public Improvements in the manner set forth in this Agreement, subject only to the conditions stated below; provided however, that the City may partially reimburse Owner for such costs sooner at its discretion. The City acknowledges that the Owner will construct the Public Improvements and any Additional Public Improvements in reliance upon the City's agreement to reimburse Owner for the cost of designing, constructing and equipping the Public Improvements and any Additional Public Improvements in the manner described in this Agreement. The City shall cooperate in good faith and take such steps as may be reasonably necessary and appropriate to facilitate Owner's receipt of a final Unified Certificate of Occupancy for the Project prior to June 15, 2021, provided that Owner shall substantially complete the Project no later than February 28, 2021 in order to provide the City with sufficient time to inspect the work and issue a final Unified Certificate of Occupancy and sufficient time to prepare

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the municipal bond for issuance no later than June 30, 2021. The City's obligation to reimburse Owner for the cost of designing, constructing and equipping the Public Improvements and Additional Public Improvements shall be subject only to the following conditions and otherwise shall be unconditional and fully binding on the City:

- i. City and Owner shall have agreed upon the plans and specifications with respect to constructing and equipping the Public Improvements and any Additional Public Improvements that are added to the Project. The Parties shall memorialize their agreement as to the final design and specifications by signing Final Design and Specification Sheets once the final designs have been agreed to by the Parties. The Parties shall use their best efforts to sign the Final Design and Specification Sheet for the new segments of Pine Street and St. Paul Street not later than March 31, 2018, and to sign the Final Design and Specification Sheet for all remaining Public Improvements not later than October 31, 2018, and to sign the Final Design and Specification Sheet for any Additional Public Improvements not later than March 31, 2019;
- ii. City and Owner shall have agreed upon the detailed Final Budget relative to the items for which reimbursement is sought, including the cost to design, construct and equip the Public Improvements, the cost to design, construct and equip any Additional Public Improvements that are added to the Project, the costs of acquiring real property interests in St. Paul Street and Pine Street, and together with other associated and related costs described in Question 4 of the November 8, 2016 municipal ballot;
- iii. The City shall have received completed monthly and annual reports with respect to items for which TIF funding is sought on forms to be provided to the Owner by the City for such purposes in accordance with Section 3(c) of this Agreement. No other materials, forms or information shall be required of the Owner as a condition to the reimbursement. The City shall notify the Owner if any monthly report or annual report is not timely received by the City, in which case the Owner shall file such report within thirty (30) days following receipt of such notice;
- iv. Owner shall have received a final Unified Certificate of Occupancy for the Project prior to June 30, 2021 unless the City agrees otherwise, as described in Section 4(d) of this Agreement. The City shall cooperate, use reasonable efforts and otherwise reasonably assist the Owner in obtaining the Unified Certificate of Occupancy by the date specified;
- v. Owner shall have conveyed and the City shall have accepted the segments of St. Paul Street and Pine Street, together with the roadways, utilities and other improvements and infrastructure constructed therein and thereon, to the City in the manner required by Section 4(f);
- vi. Owner and the City shall have executed an agreement memorializing the terms

of Section 4(d) in the form attached as **Exhibit E**; and

- vii. Owner shall have, by December 31, 2019, provided to the City, for submission to the Vermont Economic Progress Council, an executed construction contract and a completion guarantee evidencing Owner's commitment to construct not less than \$50,000,000 of private development on the Property, as described in Section 4(a) of this Agreement.
- viii. Solely with respect to any Additional Public Improvements that are not complete at the time that the Project is complete and the foregoing conditions (i) through (vii) have been satisfied, the City's obligation to reimburse Owner for the cost of designing and constructing such Additional Public Improvements shall be subject to satisfaction of the foregoing conditions (i), (ii) and (iii) with respect to such Additional Public Improvements, together with the City's receipt of: the certification from the Project engineer that such Additional Public Improvements were completed in accordance with the approved plans and specifications; as-built drawings in hard copy, AutoCAD and PDF formats; and all additional documentation prepared by the Project engineer with respect to such Additional Public Improvements including, without limitation, notes, photographs, reports, quality control testing reports, change orders, and submittals, as required by Section 3(c)(viii). For clarity, the City agrees that the City shall reimburse Owner, in accordance with the terms of this Agreement, for all Work (other than any incomplete Additional Public Improvements) upon satisfaction of the conditions set forth in (i) through (vii) above, and thereafter, upon completion of such Additional Public Improvements, the City shall reimburse Owner in accordance with the terms of this Section 4(c)(viii).

Upon the satisfaction of all of the above stated conditions the City will promptly reimburse the Owner (and/or the Owner's bank per any credit agreement between the City, Owner and any such bank) all costs and expenses incurred by Owner in connection with the Project that are agreed to and are eligible to be reimbursed by the City under and in accordance with this Agreement. If for any reason the City fails to reimburse the Owner as required by this Agreement, then the Owner shall not be obligated to convey the sections of St. Paul Street and Pine Street together with the roadways, utilities and other improvements and infrastructure constructed therein and thereon as set forth in Section 4(f) unless and until such time as the City reimburses the Owner as required by this Agreement. The Parties acknowledge that, upon the satisfaction of the above stated conditions, time shall be of the essence with respect to the City's obligation to reimburse Owner for the Public Improvements and or the Additional Public Improvements as set forth in this Agreement. If, notwithstanding the satisfaction of the above-stated conditions, the City fails to reimburse the Owner for the Public Improvements and or the Additional Public Improvements as set forth in this Agreement on or before March 31, 2020, or such later date as may be agreed to by the Parties, the City shall pay in addition to all other sums agreed to be reimbursed to the Owner by the City as set forth in the Final Budget the additional carrying costs incurred by Owner in connection with Owner's TIF loan for the period from the reimbursement date to the date of conveyance to the City. The City shall execute such documentation as Owner and/or Owner's financing partner and/or third party lender may reasonably request to evidence its obligation to reimburse Owner for

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the costs described in this Section 4(c) in accordance with and subject only to the satisfaction of the conditions specified above.

d. The Parties acknowledge and agree that the construction of the Public Improvements will be bid, and will be accounted for, separately from the Private Improvements, and the City is only legally able to use Waterfront TIF District funds to pay for the actual costs to construct the Public Improvements and Additional Public Improvements, to pay for the value of the real property interests in St. Paul Street and Pine Street that the City acquires as a component of the Public Improvements (as described in Section 4(f)(i)), and to pay certain other associated and related costs described in Question 4 of the November 8, 2016 municipal ballot. In addition, as stated above, the amount of money that the City is able to pay for the Public Improvements is limited by the obligation that the debt must be committed prior to June 30, 2021 (meaning, that Owner must receive a final Unified Certificate of Occupancy for the Project prior to such date unless the City agrees otherwise) and by the obligation that the tax increment generated by the Private Improvements must be sufficient to service the debt incurred by the City to pay such costs. The Parties acknowledge that the tax increment generated by the real property owned by Owner numbered 101 Cherry Street, Burlington, Vermont and identified as Parcel No. 044-4-004-001, which is improved with a four story mixed-use (retail/office) building, is also legally permitted to contribute to the payment of debt service on the municipal bonds issued to finance the City's payments under this Section 4. The City will assess the Property and 101 Cherry Street using the normal assessment procedure required by applicable state law, provided that if the City finds it necessary to ensure that the total tax increment generated by the Private Improvements, by those portions of the Property that are not part of the Project, and by 101 Cherry Street is sufficient to pay the debt service on the municipal bonds issued to finance the City's payments under this Section 4, the City shall establish the minimum assessed value of the Property upon completion of the Project so that sufficient tax increment is generated to pay the debt service on the municipal bonds, and the City shall provide Owner with documentation that reasonably substantiates the assessed value of the Property established by the City for such purposes. Any such minimum assessment of the Property shall only be in effect during the period of municipal bond repayment and only while necessary to ensure the total tax increment generated by the Private Improvements is sufficient to pay the debt service on the municipal bonds. Owner agrees not to appeal the minimum assessment of the Property in an effort to reduce it below the value established by the City pursuant to this paragraph, and Owner shall pay property taxes based upon at least that minimum assessed value during the period of municipal bond repayment regardless whether any portion of the Property is owned by an entity that is statutorily exempt from property taxation or that is subject to statutorily limited or reduced property taxation. The Owner's agreement to pay such property taxes and not to appeal such assessment during the period of municipal bond repayment is hereby established as a covenant binding upon Owner and its successors and assigns running with title to the Property and having the same degree of priority as municipal property taxes until such time as the municipal bonds shall have been paid in full. At the City's request, and subject to the reasonable requirements of Owner's construction or permanent financing, the foregoing agreement shall be memorialized by an agreement to be executed by the Parties and recorded in the land records prior to the City's payment for the Public Improvements and any Additional Public Improvements and shall be a contractual covenant binding upon Owner and its successors and assigns, running with the title to the Property regardless of the tax exempt status of the owner of any portion of the Project or Property.

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e. The Parties agree and acknowledge that the Owner may pledge any rights it has to reimbursement for the agreed-upon cost of constructing the Public Improvements and any Additional Public Improvements as additional security to its lender(s) or other financing parties. At Owner's request, the City shall enter into a separate agreement with Owner and/or with Owner's construction lender solely with regard to the City's reimbursement of the agreed-upon cost of constructing the Public Improvements and any Additional Public Improvements so long as such separate agreement contains terms and conditions that are consistent with those contained in this Agreement with respect to such matters and that do not impose any additional material obligations on the City or the Owner. Without limiting the foregoing, the City agrees to work cooperatively and in good faith with the Owner's construction lender to provide the construction lender with assurance of funding for the Public Improvements in accordance with the terms and provisions of this Agreement, including without limitation by entering into a customary and commercially reasonable intercreditor agreement or collateral assignment agreement required by said construction lender (meaning that Owner may assign its rights under this Agreement to receive payment and reimbursement from the City as security for Owner's construction loan, with the understanding that although such assignment shall be a present assignment of its rights under this Agreement, the construction lender will only enforce the assignment if Owner defaults under its construction loan). There shall be no conditions to the Owner receiving the reimbursement from the City other than the conditions set forth in Section 4(c)(i) - (vii) with respect to the Project, and the condition set forth in Section 4(c)(viii) with respect to any Additional Public Improvements that are not complete at the time that the Project is complete. Owner shall not be obligated to start the construction of the Project until the City provides the required assurances to the construction lender as set forth in this section and until the City provides documentation reasonably satisfactory to the Owner that the City is obligated to reimburse the Owner for the agreed-upon cost of constructing the Public Improvements in the manner set forth in this Agreement. The City shall be obligated to provide the documentation and the assurances referenced above even if the Owner starts construction of the Project prior to finalization of such assurances and documentation.

f. St. Paul Street and Pine Street.

- i. Ownership Interest. The Parties agree that Owner shall convey to the City and the City shall acquire from Owner fee simple title to the segments of St. Paul Street and Pine Street depicted as Parcels 1 and 3 on that certain survey entitled "Lot Line Adjustment for BTC Mall Associates LLC, 101 Cherry Street, Burlington Vermont, by LATITUDES Land Surveying, dated January 9, 2017 and recorded in Map Slide 533B of the City of Burlington Land Records (the "Lot Line Adjustment Survey"), which Lot Line Adjustment Survey was included in the Plans approved by the DRB Approval and was filed with the City's Administrative Officer on June 9, 2017. A copy of the as-recorded Lot Line Adjustment Survey is attached hereto as **Exhibit F**. The Owner shall at the same time convey to the City and the City shall acquire from Owner all applicable warranties from Owner's contractors, subcontractors and material suppliers, subject to easements for utilities and for other agreed-upon Project infrastructure (e.g., stormwater infrastructure, building foundations, and building protrusions for which permits and

approvals have been issued). The Owner shall convey to the City and City shall acquire from Owner the real property interests in the segments of St. Paul Street and in Pine Street by warranty deed, free and clear of all mortgages, security interests and liens (or rights to claim a mechanic's or materialman's lien under 9 V.S.A. Chapter 51) and free and clear of all encumbrances that would preclude or impair the use thereof as public streets, subject to the limitations set forth in the remainder of this paragraph; provided that Owner shall be entitled to retain the above-described easement rights and easement rights that would permit the construction of aerial walkways over St. Paul Street and Pine Street that provide clearance for vehicular traffic in accordance with applicable laws, codes and regulations, subject to Owner's ability to obtain required permits and approvals therefor. In addition, Owner shall convey to the City by warranty bill of sale the roadways, utilities and other improvements and infrastructure constructed therein and thereon. Owner discloses that a portion of the segment of Pine Street to be built between Bank and Cherry Streets is owned by a third party subject to an easement for pedestrian and vehicular access to the existing parking garage in favor of the Property; accordingly, while Owner is able to assign to the City its easement for pedestrian and vehicular access to the existing parking garage in favor of the Property, Owner is not able to convey a fee simple interest in that portion of Pine Street to the City and the City may need to acquire the right to construct, use, maintain, repair and replace the roadway, utilities and other improvements and infrastructure within that portion of Pine Street directly from the owner of that property. Neither the City's execution of this Agreement nor the issuance of the DRB Approval shall imply or be construed to imply that the City is familiar with Owner's title to the segments of St. Paul Street and Pine Street that the City intends to acquire pursuant to this Agreement, or that the City has approved or has any authority to approve any action that Owner may take in relation to the rights of third parties or that is or may be contrary to or in violation of rights held by third parties with respect thereto. Owner makes no representation concerning the rights of any third party or that Owner is able or capable of acquiring said third party rights prior to the start of construction of the Project. In the event that the Owner acquires title to any third party rights following or prior to the date of this Agreement, nothing herein shall be construed as an agreement to convey such rights to the City (or any other party) without consideration to be negotiated and agreed upon by the Parties, and nothing herein obligates the City to accept the segments of St. Paul Street and Pine Street if they are subject to any encumbrances that would preclude or impair the use thereof as public streets. The Parties will cooperate in good faith to resolve or eliminate any third party rights in such real property to the Parties' mutual satisfaction prior to the conveyance to the City. At the time of the City's reimbursement to Owner for the cost of the Public Improvements, Owner shall convey to the City the fee interest in the segments of St. Paul Street and Pine Street identified in the DRB Approval as a gift and will forgo any consideration. The City shall cooperate

with Owner's efforts to convey St. Paul Street and Pine Street to the City as a gift or "bargain sale", as defined by the Internal Revenue Code, including by executing an IRS Tax Form 8283 prepared by Owner at Owner's expense. Owner shall be solely responsible for the calculation and substantiation of the amount and other details of the bargain sale, subject to the understanding that applicable accounting rules require the City to account for any money spent to resolve or eliminate any third party rights in St. Paul Street and/or Pine Street and any money spent to reimburse Owner for demolition costs as acquisition costs. Once the City shall have acquired the new sections of St. Paul Street and Pine Street, it shall maintain them in accordance with its standard maintenance practices and standards. Nothing in this paragraph shall limit the Owner's rights to convey Parcels 2, 4 and/or 5 of the Property, as depicted on the recorded Lot Line Adjustment Survey.

- ii. Prior to the City's acceptance of St. Paul and Pine Streets, Owner shall comply with the requirements of the DRB Approval and any permits issued for the Project by the Department of Public Works, and the Parties will execute a memorandum of understanding in the form attached as **Exhibit G**, which will specify their respective obligations with regard to any stormwater infrastructure situated within those municipal rights of way; without limitation, the memorandum of understanding will state that the City will not be obligated to pay for any capital repairs to the filtration systems and holding tanks that are part of the stormwater infrastructure and the City will not be obligated to maintain or inspect the filtration systems or holding tanks, but the City will agree to maintain, inspect and repair street improvements where they drain into the filtration systems and holding tanks.
- iii. Temporary Street Closures. The Burlington Police Department ("BPD") is vested with the authority to allow temporary street closures, following consultation with the Department of Public Works ("DPW"), for events sponsored by private individuals and entities and has in place a process for the issuance of temporary street closure permits. The City acknowledges that the Owner intends to seek temporary street closures adjacent to the Project for fairs, events, and promotions and will not unreasonably interfere with Owner's application to close streets in connection with such events, subject to any applicable fees. If Owner desires to establish a process to facilitate its ability to close St. Paul Street and Pine Street on an expedited basis for events, fairs and other promotions, it shall develop a bi-annual or annual calendar of events and submit the calendar to BPD and DPW for their prompt review and approval, and it shall also use reasonable efforts to coordinate all public events that require temporary street closures with the Church Street Marketplace, the Burlington Business Association ("BBA") CEDO and GMT, provided that such organizations are reasonably cooperative, in advance of any closure request.
- iv. On-Street Parking; Loading. As stated in Section 3(a) of this Agreement, the

new sections of St. Paul Street and Pine Street shall be constructed in substantial compliance with the City's "Great Streets" standards, in a manner agreed upon by the Parties, which are likely to physically preclude on-street parking along such street sections. The City will agree to enter into a fifteen (15) year license agreement with Owner to prohibit on-street parking and allow restricted passenger drop off and loading zones within the new sections of St. Paul Street and Pine Street daily from 6 a.m. until 7 p.m. upon the City's standard terms and conditions, including an aggregate cost to Owner of ten dollars (\$10.00).

- v. Temporary Relocation of Municipal Property. If Owner desires the ability to temporarily relocate benches, trash cans and other similar items of municipal property located along the new sections of St. Paul Street and Pine Street to accommodate events, fairs and other promotions, then the City shall grant Owner such temporary relocation right as long as Owner (1) accomplishes such temporary relocation (including removing and replacing the property) at its sole cost and expense, (2) stores and then returns the relocated municipal property where directed to by the City, and (3) promptly repairs and restores any damage that arises in connection with such temporary relocation (or, if appropriate, replaces damaged property) at its expense. Owner shall indicate on the bi-annual or annual calendar of events that it develops pursuant to Section 4(f)(iii) above whether it desires to exercise this temporary relocation right in connection with each event.
- vi. Discontinuance. Upon the City's acquisition of the new sections of St. Paul Street and Pine Street, the City shall grant Owner a right of first offer with respect thereto upon the terms and conditions set forth on **Exhibit H** attached hereto and made a part hereof. In addition, the Parties acknowledge that if the new sections of St. Paul Street or Pine Street are ever discontinued as municipal streets, then title to the discontinued right-of-way shall belong to the owners of the adjoining lands in accordance with 19 V.S.A. § 775.

g. Sales Tax Reallocation or Exemptions. The City agrees to use its diligent, reasonable and good faith efforts to support Owner's efforts to apply for and obtain sales tax exemptions, refunds and/or abatements for items purchased during construction (Construction Sales Tax Exemption) that are normally available from the State of Vermont to qualified Vermont development projects such as the Project. Any reallocation of Project sales tax that is awarded by the State of Vermont shall be used by the Parties to pay for mutually agreed-upon expenditures that support the Project and that meet the requirements established by the State of Vermont, and the Parties shall prepare a budget for such purpose.

h. Municipal Fees.

- i. Recognizing (A) the economic and non-economic benefits that are anticipated to flow from the development and construction of the Project, (B) the size and scope of the Project and the amount of the permitting fees

realized by the City in connection with the Project, and (C) the commitment of resources dedicated by the Owner to the Project, the City agrees that:

1. Owner shall only be required to pay to the Burlington Department of Planning and Zoning a municipal zoning fee of \$262,500.00 in connection with the issuance of the DRB Approval. Any payment already made by the Owner over and above this amount will be applied towards the Department of Public Works fees associated with obtaining a building permit as required in Section 4(h)(i)(2) below;
2. Owner shall only be required to pay to the Burlington Department of Public Works a total of \$262,500.00 to obtain all building permits required for the Project, including all of the City's building trade permits required for the Project (being building, mechanical, electrical and plumbing), including any associated inspection fees, regardless whether such fees are imposed directly on Owner or are imposed on Owner's general contractor or a subcontractor. The fees required by Subsections (4)(h)(i)(1) and 4(h)(i)(2) include the cost to obtain the Unified Certificate of Occupancy to be issued by Burlington Code Enforcement at the completion of the Project to close the DRB Approval and the building trade permits issued for the Project. Any payment already made by the Owner or any of Owner's contractors or subcontractors in connection with the Project shall be applied against the foregoing fee. For instance, fees for demolition, electrical work, enabling work and other work such as HVAC have already been paid to the Department of Public Works and shall be applied against the fees stated above.
3. Owner shall pay no more than \$75,000.00 in fees under Chapter 13 of the City's Code of Ordinances ("Fire Protection and Prevention"), including without limitation any fees required for permits and inspections required thereby, such as permits related to Project fire suppression and the Project fire alarm system;
4. Owner shall pay encumbrance permit fees in accordance with the License Agreement between the City and PC Construction Company with respect to the Project for the period running from September 1, 2017 through August 31, 2020, which was approved by the City Council on August 28, 2017, as it may be amended; and
5. Owner shall pay the full impact fee in the amount of \$1,297,648.95 required in connection with the Project as described in the DRB Approval, which amount includes the impact fee waiver attributable to affordable housing that is available under Section 12.0 of the City's Impact Fee Administrative Regulations last updated for fiscal year 2016 and includes a full credit for the existing retail and garage

space that will be demolished as part of the Project and applied to any building area constructed to replace the existing retail and garage space and used for a permitted use.

6. Consistent with Chapter 27, Article 2 of the Burlington Code of Ordinances, Owner shall not be obligated to pay Excavation Fees associated with the work to construct Public Improvements and Additional Public Improvements on the City's behalf.
 7. Consistent with Chapter 27, Article 2 of the Burlington Code of Ordinances, Owner shall be obligated to pay only the Administrative Fee for Excavation fees (currently set at \$1.58/square foot) for Private Improvements within the Right of way where Public Improvements or Additional Public Improvements are planned. For all other rights of way where Private Improvements are required and where no Public Improvements or Additional Public Improvements are planned, all Excavation Fees will apply.
- ii. Owner shall apply for and obtain all zoning and building permits for the Project in the Owner's name and hold such permits for both the benefit of the Owner, and for the benefit of the Owner's general contractor and all subcontractors. Owner and Owner's contractors and subcontractors shall apply for and obtain all building and building trade permits for the Project either in the Owner's name or in the contractor's or subcontractor's name, as appropriate depending on the nature of the work covered by the permit, and shall hold such permits for the benefit of the work covered by the permit. Neither the Owner's general contractor, nor any subcontractor, shall be required to apply for and obtain a separate building or zoning permit in connection with the Project if Owner already holds such permit in connection with the Project. All work performed as part of the Project must be properly permitted and inspected; however, if a separate building or zoning permit for Owner's general contract or any subcontractor is required by the City, then the City shall not assess any fees in connection with such additional permits in excess of the fees established by this paragraph.
 - iii. The agreement regarding fees contained in this Section (4)(h) only applies to the Project as permitted under the DRB Approval, and only to the specific fees referenced and itemized above; any fees not referenced and itemized above shall be payable at standard rates.
 - iv. If Owner modifies the Project and seeks or is required to seek amendments to the Project zoning or building permits, then Owner shall pay the standard fees associated with such new or amended permits, if any.
 - v. This Section (4)(h) does not limit the City's right to impose, or Owner's obligation to pay, any fines, penalties or other fees that may be imposed or

assessed as the result of any violations of applicable permit conditions, ordinances, laws or regulations.

5. Cooperation; Labor and Community Workforce; Construction Management and Coordination; Further Assurances.

a. Cooperation. The Parties shall cooperate and communicate with each other on a regular basis, including by arranging joint meetings with appropriate personnel present to address issues set forth in this Agreement, to discuss any proposed changes to the Project and to discuss the Work Product (as such term is defined in Section 5(a) of this Agreement) generated as the Project progresses, so as to permit the orderly and efficient construction and development of the Project. The City will in good faith support adjustments or modifications to the Project, including changes to the program as outlined in the "Background" section to this Agreement, that are pursued by the Developer, including providing support in connection with any required municipal approvals or processes, provided that such adjustments or modifications are consistent with the City's objectives and policies, all in the City's sole discretion.

b. Labor and Community Workforce. Owner and the City agree to the following:

- i. Owner will use reasonable efforts to provide jobs for qualified low and moderate income residents of Burlington and surrounding areas to construct and operate the Project. Owner will also use reasonable efforts to employ (either directly, or indirectly through its general contractor and the Project's subcontractors) the unemployed, veterans, minorities, women, New Americans (collectively, "Targeted Job Applicants"), so long as such individuals have the requisite skills and experience required for the respective job position and otherwise meet all requirements for said jobs, to construct and operate the Project.
- ii. Owner shall use reasonable efforts to post notice of job openings in advance of hiring for all positions. Job openings may be advertised in specific online and physical locations identified by and recommended by CEDO.
- iii. Owner and its general contractor will participate in two job fairs sponsored by the City or by one or more City affiliates prior to or during construction of the Project. Owner shall also participate in at least one post-construction job fair. The City will partner with key agencies and organizations to provide support for such job fairs.
- iv. Owner agrees to identify the jobs and skills needed to operate the Project upon completion, and it shall encourage tenants of the Project to participate in jobs fairs to support recruitment of Targeted Job Applicants in permanent jobs and to encourage tenants of the Project to notify and publish job openings in specific online and physical locations identified by CEDO.
- v. Owner will include in its general contract for the Project a requirement that

the labor employed to construct the Project (including without limitation labor employed by Owner and by Owner's general contractor and by the Project's subcontractors) shall be paid a "livable wage" as that term is defined in the City of Burlington Livable Wage Ordinance as is in effect on the date of this Agreement. Owner and its general contractor shall complete and return an annual reporting form provided by the City to report on its compliance with this provision, consistent with the Burlington Livable Wage Ordinance.

- vi. Owner will use reasonable efforts to incorporate locally and regionally sourced materials, products and services in the Project. Owner will support and cooperate with the City's efforts to publicize the Project's use of locally and regionally sourced materials, products and services.
- vii. With regard to the construction of the Private Improvements, Owner shall hire contractors and subcontractors who pay appropriate wages, properly classify employees, obey labor laws, participate (where applicable) in formal apprenticeship training programs, and provide employer funded health and retirement benefits, with the understanding that it is the Parties' intent that the foregoing shall not be understood to preclude the Owner from engaging any qualified contractor or construction manager to construct the Project. To evidence its compliance with this provision, annually throughout the construction of the Project Owner shall require contractors and subcontractors who are then working on the Project and who perform work or are expected to perform work with a value of at least \$100,000 to execute and deliver to the City a compliance certificate in the form attached hereto as **Exhibit I**.
- viii. With regard to the construction of the Public Improvements, the Owner shall hire contractors and subcontractors who pay appropriate wages, properly classify employees, obey labor laws, participate (where applicable) in formal apprenticeship training programs, and provide employer funded health and retirement benefits, with the understanding that it is the Parties' intent that the foregoing shall not be understood to preclude the Owner from engaging any qualified contractor or construction manager to construct the Project. To evidence its compliance with this provision, annually throughout the construction of the Project Owner shall require contractors and subcontractors who are then working on the Project and who perform work or are expected to perform work with a value of at least \$100,000 to execute and deliver to the City a compliance certificate in the form attached hereto as **Exhibit I**.
- ix. Owner shall solicit and review proposals from community job training programs, such as Youth Build Vermont and Vermont Works for Women, to participate in the construction of portions of the Project, provided that Owner shall not be required to utilize any such programs.

- c. Construction Management and Coordination.
- i. Owner and the City agree to work together in good faith to provide timely communications and other information concerning Project construction, such as potential disruptions to current mall tenants and neighboring property owners affected by the construction of the Project and to take such steps to mitigate potential construction impacts on such parties that can reasonably be expected to be effective, all as more particularly discussed in this Section 5(c); provided that nothing required herein shall alter or delay the timeline or the construction schedule for the Project.
 - ii. The Parties acknowledge that the City has adopted certain standard operating procedures for the issuance of a Construction Encumbrance Permit in connection with construction projects that will impact municipal assets such as streets and sidewalks, and that the issuance of a Construction Encumbrance Permit allows for the temporary closure of public streets and sidewalks to facilitate construction. Owner acknowledges that this process includes the provision of a Traffic Management Plan and a Traffic Control Plan, which must be submitted to DPW for its review and for approval by the City Council prior to DPW's issuance of a Construction Encumbrance Permit.
 - iii. Owner shall cause its general contractor or construction manager to meet with appropriate DPW personnel prior to commencing construction of the Project to discuss Owner's intended construction process, project phasing and means and methods of construction so that the Parties can work together to facilitate construction in a manner that will minimize disruption to the area surrounding the Property.
 - iv. Prior to commencing structural demolition or construction of the Project, Owner shall perform a pre-construction physical survey of all buildings, sidewalks, curbs and streets that could be impacted by demolition or construction of the Project to determine their existing physical condition.
 - v. Before demolition and construction commence, Owner, Owner's general contractor and the City shall jointly hold at least two meetings with members of the business community in the vicinity of the Property for the purpose of describing construction phasing and timing, and listening to community concerns with regard to the impact of Project construction, in an effort to reasonably mitigate construct impacts on the surrounding business community.
 - vi. Owner, or its general contractor, shall establish and operate a hotline (both telephone and web-based) for use by the surrounding business community to quickly and reliably submit information to the general contractor and project

superintendent. The hotline contact information (i.e., telephone number and website address) shall be publicized on signs posted in and around the construction zone. Owner shall maintain and share with the City upon written request a detailed log of calls received from concerned stakeholders that shall include the description of the issue and how the issue was addressed.

- vii. The City, acting through CEDO, shall work with Owner to coordinate the delivery of the following services:
1. Timely communication with businesses about construction impacts, construction schedules and traffic patterns, including signage related thereto.
 2. Timely communication with businesses about the availability of parking and/or shuttle services.
 3. The telephone and website hotlines described above.
 4. Contact information for a City communications manager or community liaison with whom Owner will coordinate the delivery of the services.
 5. Contact information for an Owner communications manager or program liaison with whom CEDO will coordinate the delivery of the services.
 6. As a component of the Parties' community outreach efforts in connection with the Project, the Owner will install, in cooperation with the City and Church Street Marketplace, signage and graphics placed on the Project's temporary barrier fencing to depict and describe the Project and its attributes, to communicate that downtown merchants are open for business during construction of the Project, and to engage the community.

d. Payment to CEDO. Owner shall pay CEDO the sum of Fifty Thousand Dollars (\$50,000.00) per year for two (2) years during the construction term of the Project. The first payment will be made upon commencement of foundation work for the construction and the second payment will be made on or before the day that is ninety (90) days after the first anniversary of the commencement of that foundation work. Such payment shall be used by CEDO to assist businesses in the vicinity of the Project during construction, to support community outreach associated with the Project and to support workforce training efforts associated with the Project.

e. Parking During Construction. The Parties acknowledge that approximately 300 parking spaces in Owner's existing parking garage are currently leased to third parties, and that Owner will need to secure replacements for such parking spaces prior to commencing demolition of the existing garage. To assist Owner's efforts to secure replacement parking spaces, the City agrees to offer 300 parking spaces within municipal parking lots and structures to people holding parking space leases with Owner on a first come, first served basis, subject, however, to availability given that the City's College Street Garage will be partially closed for renovations during the 2017 construction season. In addition, the City shall assist Owner to identify parking resources in Burlington and South Burlington that may be available for lease. As a component of its Traffic

FINAL VERSION

Management Plan, Owner shall lease off-site parking spaces for its contractors and their employees and establish a shuttle service between such off-site parking spaces and the Property, consistent with the DRB Approval.

f. Owner agrees to keep open and available to the public, and in a good state of maintenance, repair and cleanliness, the existing, public restrooms located in the portion of Owner's Property bounded by Church St., Cherry St. Bank St. and St. Paul St. until such time as the area that encompasses the restrooms is leased to a third-party tenant, at which time Owner's obligation under this paragraph shall cease, provided that the Parties agree and acknowledge that the current bathrooms require renovation and reconstruction and therefore shall be subject to temporary closure to accommodate such renovation and reconstruction.

g. The Parties agree to execute, acknowledge, if necessary, and deliver such documents, certificates or other instruments and take such other actions as may be reasonably required from time to time to carry out the intents and purposes of this Agreement.

6. No Assignment; Financing Matters. This Agreement shall not be assigned by Owner without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed so long as Donald F. Sinex continues to hold and exercise executive managerial authority regarding the development and construction of the Project. The City acknowledges that the beneficial interests in the Owner as of June 23, 2017 were transferred and are now held by Rouse Properties, Inc., a large national real estate investment trust, and Devonwood Investors, LLC, a real estate development company owned and controlled by Donald F. Sinex; and because Donald F. Sinex holds and exercises executive managerial authority regarding the development and construction of the Project, such prior transfers to Rouse Properties, Inc. and to Devonwood Investors, LLC are deemed to be permissible by the City. Notwithstanding, the Owner shall be entitled to collaterally assign this Agreement, and its rights hereunder, to any of its lender(s) and other financing parties without the City's consent, and such lender(s) and other financing parties shall have the right to assign this Agreement to a successor developer in connection with their enforcement of their collateral rights in this Agreement. The City shall execute documentation to evidence and agree to such collateral assignment as may reasonably be requested by such lender(s) or other financing parties in connection with such collateral assignment. The City acknowledges that Owner's lender(s) and other financing parties are likely to hold a mortgage of the Property and to hold other security interests with respect to the Project and the Property, and the Parties agree that upon the City's reimbursement of the costs of constructing the Public Improvements and the City's acquisition of real property interests in St. Paul Street and Pine Street, such mortgage and other security interests shall be released with respect thereto.

7. Governing Law; Venue. This Agreement shall be governed and construed in accordance with the laws of the State of Vermont, without regard to its conflicts of law rules. The Parties consent to and submit to in personam jurisdiction and venue in the State of Vermont, County of Chittenden, and in the U.S. District Court for the District of Vermont. The Parties assert that they have purposefully availed themselves of the benefits of the laws of the State of Vermont and waive any objection to in personam jurisdiction on the grounds of minimum contacts, waive any objection to venue, and waive any plea of forum non conveniens. This consent to and submission to jurisdiction is with regard to any action related to this Agreement, regardless of whether the

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Parties' actions took place in the State or elsewhere in the United States.

8. Severability. If any term, covenant or condition contained in this Agreement is held to be invalid by any court of competent jurisdiction, such invalidity shall not affect any other term, covenant or condition herein contained, provided that such invalidity does not materially prejudice any Party in their respective rights and obligations contained in the valid terms, covenants or conditions hereof, and the Parties shall cooperate to modify the Agreement to cause it to conform to the original language of the Agreement to the extent consistent with the finding of the court.

9. Construction; Headings. The Parties waive the benefit of any rule that this Agreement is to be construed against one Party or the other. The headings in this Agreement are for the purposes of reference only and shall not limit or otherwise affect the meaning hereof.

10. Integration; Modification. This Agreement, together with the exhibits referenced herein and/or attached hereto, constitutes the entire agreement between the Parties with respect to the subject matter hereof and supersedes any prior agreements or representations, oral or written, on the same subject. The Agreement can be modified only by written agreement executed by authorized representatives of each Party.

11. No Partnership. The Parties do not intend by this Agreement to create, nor shall this Agreement be deemed to create, a partnership or a joint venture among the Parties; each Party is an independent actor and entity, and nothing in this Agreement shall be deemed to make either Party an agent or partner of the other, or to give either Party the right to bind the other in any way, notwithstanding any reference to the Project as a "public-private partnership."

12. Force Majeure. If either Party shall be delayed, hindered in or prevented from the performance of any act required hereunder, by reason of strikes, lock-outs, labor troubles, inability to procure materials, failure of power, restrictive state or federal governmental laws or regulations, riots, insurrection, war, terrorism, or other reason beyond its reasonable control (including the act, failure to act or default of the other Party), then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay, provided that no such event shall excuse a Party's failure to comply with any time period imposed by statute.

13. Waiver. The failure of either Party to insist on strict performance of any of the provisions of this Agreement or to exercise any right it grants will not be construed as a relinquishment of any right or a waiver of any provision of this Agreement. No waiver of any provision or right shall be valid unless it is in writing and signed by a duly authorized representative of the Party granting the waiver.

14. Incorporation by Reference. The content of the Background section to this Agreement, including without limitation the definitions set forth therein, and all exhibits hereto and the terms contained therein and the contents thereof, are incorporated into this Agreement by reference.

15. Authority. Each of the Parties warrants to the other that the person or persons executing this Agreement on behalf of such Party has the full right, power and authority to enter into and execute

FINAL VERSION

this Agreement on such Party's behalf and to thereby bind the Party on whose behalf such person, and that no consent from any other person or entity is necessary as a condition precedent to the legal effect of this Agreement except as provided herein.

16. Notices. Any notices to be given pursuant to this Agreement shall be sufficient if given by a writing: deposited in the United States mails, certified mail or registered mail, return receipt requested, postage prepaid; by commercial courier, provided the courier's regular business is delivery service and provided further that it guarantees delivery to the addressee by the end of the next business day following the courier's receipt from the sender; by facsimile; or by email (provided that the electronic process used is reasonably secure and not easily susceptible to manipulation) addressed as follows:

If to the City: City of Burlington
 City Hall
 149 Church St.
 Burlington, VT 05401
 Attention: Mayor Miro Weinberger

With a copy to: City Attorney
 City Hall
 149 Church St.
 Burlington, VT 05401

If to Owner: BTC Mall Associates LLC
 101 Cherry Street, Suite 440
 Burlington, Vermont, 05401
 Attention: Donald Sinex

With a copy to: Brian Dunkiel, Esq.
 Dunkiel Saunders
 91 College Street, P.O. Box 545
 Burlington, Vermont 05402-0545

or to such other person, address or number as the Party entitled to such notice or communication shall have specified by notice to the other Party given in accordance with the provisions of this Section. Any such notice or other communication shall be deemed given: (i) if mailed, three days after being deposited in the mail, properly addressed and with postage prepaid; (ii) if sent by courier, the next day after being deposited with the courier, properly addressed and with prepaid; (iii) if sent by facsimile, when transmission has been electronically confirmed; and (iv) if sent by email, when transmitted as long as the sender does not receive a delivery failure notification.

17. Designated Representatives. Each Party shall designate one or more representatives to serve as the primary contact for communications relating to and issues arising under this Agreement. In the event that either Party changes its designated representative(s), it shall notify the other Party of the successor designated representative in accordance with Section 15.

FINAL VERSION

18. Reporting Requirements. In the event that the Owner fails to timely file a report hereunder, the City shall provide the Owner written notice of such missing report(s) and Owner shall file such report(s) with the City within thirty (30) days of receipt of such notice. Any reporting obligations hereunder shall automatically terminate and shall cease to be of any further effect upon the completion of construction of the Project, other than reporting obligations with respect to periods prior to completion of construction of the Project.

19. Term. Notwithstanding any other provision in this Agreement, this Agreement shall expire and be of no further force and effect on the date which is the later of (a) six (6) months after substantial completion of the Project (meaning, the issuance of a permanent Unified Certificate of Occupancy for the Project) or (b) six (6) months after the City has delivered to Owner written acceptance of the Public Improvements. Owner may terminate this Agreement by formally abandoning, withdrawing and relinquishing the DRB Approval prior to commencing construction of the Project.

20. PDA. Upon the full execution of this Agreement, the PDA shall terminate and cease to be of further force or effect, and the Parties' rights, liabilities and obligations thereunder shall automatically cease without further action of the Parties.

Signature Page to Follow

In Witness Whereof, this Agreement is executed by the duly authorized officers or representatives of the Parties as of the date first set forth above.

City of Burlington


BTC Mall Associates LLC

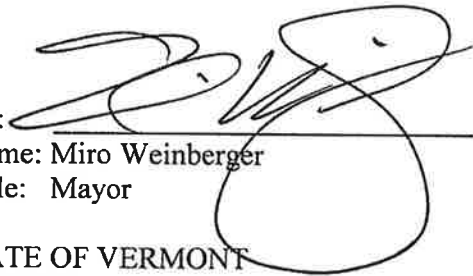
By: RD Burlington Associates, LLC, its sole member

By: RSE Burlington, LLC, its Managing Member

By: 
Name: Brian Harper
Title: CEO

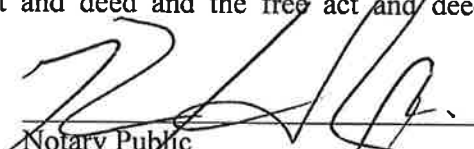
And By: BDM Associates LLC, a Member

By: 
Name: Donald Sinex
Title: Manager

By: 
Name: Miro Weinberger
Title: Mayor


STATE OF VERMONT
CHITTENDEN COUNTY

At Burlington, in said County and State, on this 30th day of October 2017, personally appeared Miro Weinberger, Mayor of the City of Burlington, and he acknowledged this instrument, by him sealed and subscribed, to be his free act and deed and the free act and deed of the City of Burlington.

Before me, 
Notary Public
My Commission Expires: 2.10.19

STATE OF VERMONT
CHITTENDEN COUNTY

At Burlington, in said County and State, on this 30th day of October 2017, personally appeared Donald Sinex, Manager of BDM Associates LLC, Member of BTC Mall Associates LLC, and he acknowledged this instrument, by him sealed and subscribed, to be his free act and deed individually and on behalf of such entities.

Before me, 
Notary Public
My Commission Expires: 2.10.19



FINAL VERSION

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On the 24 day of October in the year 2017 before me, the undersigned, a Notary Public in and for said State, personally appeared Brian Harper, personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity as CEO of RSE Burlington, LLC, the Managing Member of RD Burlington, LLC, the sole member of BTC MALL ASSOCIATES, LLC, and that by his signature on the instrument, the LLC upon behalf of which he acted, executed the instrument.

Before me, Coartney Trone
Notary Public
My Commission Expires: July 5, 2020



Burlington Development Review Board
149 Church Street
Burlington, VT 05401
www.burlingtonvt.gov/PZ
Telephone: (802) 865-7188
(802) 865-7195 (FAX)

Austin Hart, Chair
Geoff Hand
Alexander J. LaRosa
Brad Rabinowitz
Israel Smith
Wayne Senville
Alexandra Zipparo,
Jim Drummond, (alternate)
Rob Purvee, (alternate)



Burlington Development Review Board
Findings of Fact
Deliberative Meetings Monday, March 6 & 13, 2017

Board Members Present: Austin Hart, Brad Rabinowitz, Israel Smith, Ali Zipparo, Wayne Senville, and Rob Purvee (alternate.)

Absent: Jim Drummond (alternate), Alexander LaRosa and Geoff Hand (recused.)

Staff members present: David White (3-6-17), Mary O'Neil, Kimberlee Sturtevant, Scott Gustin (3-13-17.)

File: ZP17-0662CA/MA

Location: 75 Cherry Street

Zone: D **Overlay:** Downtown Mixed Use Core Overlay (DMUC) **Ward:** 3C

Date application accepted: December 15, 2016

Applicant/ Owner: Devonwood Investors, LLC (Donald Sinex) / PKSB Architects & PC Construction

Request: Mixed use redevelopment of the existing Burlington Town Center mall site, bounded by Bank Street, Cherry Street, and extensions of Pine and St. Paul Streets with associated lot line adjustments.

Applicable Regulations:

Article 2 (Administrative Mechanisms), Article 3 (Applications and Reviews), Article 4 (Maps & Districts), Article 5 (Citywide General Regulations), Article 8 (Parking), Article 9 (Inclusionary and Replacement Housing), Article 10 (Subdivision).

Background Information:

This project underwent Sketch Plan review under the address of 49 Church Street (ZP16-1258SP) as follows:

Technical Review	January 14, 2016
Conservation Board	June 6, 2016
Design Advisory Board	June 14, 2016
Development Review Board	June 28, 2016

The formal application was received December 15, 2016, and reflects a revised plan, eliminating development on the Church Street (easterly) side of the collective parcels. The associated project folder reflects the more accurate identification as 75 Cherry Street, on which parcel the proposed redevelopment will occur.



The application will reconfigure parcels; address identification is anticipated to change with the opening of Pine Street and St. Paul Streets. Addresses are anticipated to be re- assigned in consultation with the E-911 Coordinator at construction start.

Previous zoning actions for involved properties are noted below:

75 Cherry Street

- **Zoning Permit 12-0391CA**; convert asphalt turnaround area to grass and landscaping on Cherry Street side of property. September 2011.
- **Zoning Permit 79-120**; pathways within the urban renewal area and drive into parking area on parcel 10 as marked to be paved. (Cherry Street circular drive.) April 1979.

49 Church Street (interior of assembled parcels, excluding Church St. frontage)

- **Non-applicability of Zoning Permit Requirements 10-0992NA**; interior fit up for salon. May 2010.
- **Zoning Permit 10-0495CA**; install new rooftop HVAC system for Baby Gap store. November 2009.
- **Zoning Permit 10-0191CA**; install 34 x 34 in wide and 32 high 5 ton AC system on roof of Mall and connect to existing duct work. September 2009.
- **Zoning Permit 07-126SN**; Four replacement parallel signs for Burlington Town Center (Bank St. and Church St. facades and 3 new freestanding signs (Church St.) Parallel Church St. signs to be lit with new reverse channel illumination; freestanding signs to be externally illuminated. No illumination proposed for Bank St. parallel signs. August 2006.
- **Zoning Permit 04-087**; install metal panels to match Old Navy storefront, patch and paint to match. August 2003.
- **Zoning Permit 03-268**; install non-illuminated canvas shed awning on Bank St. façade of Pottery Barn. December 31, 2002.
- **Zoning Permit 03-108**; installation of concrete landing and stairs with handrails at service entry for Burlington Town Center (Pottery Barn) on Bank Street. September 2002.
- **Zoning Permit 02-360**; installation of two black canvas awnings on Bank Street for J. Crew Store. March 2002.
- **Zoning Permit 02-361**; installation of projecting sign on Bank Street for J. Crew Store. March 2002.
- **Zoning Permit 02-328**; installation of two rooftop fan units for Empire Express restaurant. February 2002.
- **Zoning Permit 02-232**; installation of 2 parallel signs on Cherry Street at Gap elevation. Installation of 2 parallel signs on Cherry Street at Filenes elevation. November 2001.

- **Zoning Permit 01-488**; parallel sign for J. Crew store, frontage on Bank Street. June 2001.
- **Zoning Permit 01-483**; amend previously approved façade improvements for the Bank Street storefront portion of the existing Burlington Town Center retail mall. Tenant to be J. Crew. June 2001.
- **Zoning Permit 01-445**; renovations to the Bank Street façade of the mall. May 2001.
- **Zoning Permit 01-404**; amend previously approved façade changes for the Cherry Street and Church Street facades of the existing retail mall. April 2001.
- **Zoning Permit 00-494**; renovations to the Cherry, Bank and Church Street frontages of the existing mall. April 2000.
- **Non-applicability of Zoning Permit Requirements**; interior change of use of 600 sq. ft. to nail salon. September 1996.
- **Non-applicability of Zoning Permit Requirements**; interior continued use of 30,000 sq. ft. for offices. June 1995.
- **Zoning Permit 93-226**; fenestration renovations to Cherry Street façade of mall for the Gap. Includes combining two windows into one and the installation of a service door. November 1992.
- **Zoning Permit 92-160**; change of use within Burlington Square Mall from bank offices to fitness center, 16,110 sq. ft. October 1991.
- **Zoning Permit 87-119**; place 8 signs for Burlington Square on various facades of structures. December 1987.
- **Zoning Permit 84-331 / COA 84-067**; construction addition to Radisson Hotel (64 new rooms, net 57 rooms) with 467 space parking garage, new 68,000 sq. ft. department store on Bank Street (Porteous), 48,000 sq. ft. addition to Burlington Square Mall. July 1984.
- **Zoning Permit 81-821**; open access between Burlington Square Mall and Woolworths at lower level of mall. December 1981.
- **Zoning Permit 81-814**; remove staircase off atrium to plaza level. December 1981.
- **Determination of Non-Applicability**; new retail store – The Limited. September 1981.
- **Determination of Non-Applicability**; wall finishes, suspended ceilings, lighting, finish flooring & store fixtures. August 1981.
- **Zoning Permit 81-578**; erect five flagpoles and one kiosk at the entrance to the mall as per 4443 (c) approval of the Board of Aldermen on 6.15.1981. June 1981.
- **Zoning Permit 81-20**; (current use; vacant land); pave pathway currently used by (illegible) between Cherry and Pearl Street to ?; erect fence with gates along the northerly and southerly boundaries. October 1980.
- **Zoning Permit 81-190**; removal of existing stairs southeast corner of mall atrium. September 1980.

- **Zoning Permit 81-171**; construct a fountain in previously approved project (scope of services). September 1980.
- **Zoning Permit 80-900**; bring plaza beneath VFSL out flush with building for offices, west elevation.
- **Zoning Permit 80-755**; construct stairway connection between McDonalds and Proposed Burlington Square Expansion. March 1980.
- **Zoning Permit 595**; Church Street entrance of Burlington Square and add approx. 30,000 sq. ft. of retail and common area space extending from Church Street to easterly boundary parcel 3. May 1979.
- **Zoning Permit 80-710**; remove stairs northwest corner of atrium from atrium floor to balcony. January 1980.
- **Zoning Permit 79-92**; entrance to Burlington Square shopping mall and open plaza. April 1979.
- **Zoning Permit 79-17**; Church Street entrance of Burlington Square and add approx. 30,000 sq. ft. of retail and common area extending from Church Street to westerly boundary of parcel 3. May 1979.
- **Zoning Permit 79-150**; install a separate entrance to the restaurant with awning at the westerly end of Burlington Square to permit evening hours independently of hours of Burlington Square Mall. May 1979.
- **Zoning Permit 78-243**; retail fruits/vegetables/juices sold from movable cart in mall atrium. December 1978.
- **Zoning Permit 78-810**; Top of the Square Inc. to erect a 60' x 60' tent and a dressing tent on the Plaza level of the Burlington Square Mall, to be used for an assembly occupancy. May 1978.
- **Amended Certificate of Appropriateness, application #75-16**; change in design of car drive-in drop off point between Vermont Federal Savings and Loan Office building and parking garage. Specifically, double curb cut, larger turnaround to accommodate 12 cars instead of 5, landscaped island with stairwell leading to concourse level incorporated within island. March 1975.
- **Certificate of Appropriateness**; construction of a below grade retail mall with open plaza above as shown on the plans dated November 20, 1972 and revised on October 26, 1973 and prepared by the office of Mies Van der Rohe and Freeman, French, Freeman. March 1974.

The current application has been reviewed and received recommendations of approval from:

The Conservation Board January 9, 2017
 Design Advisory Board January 17 and 24, 2017

At its January 9, 2017 meeting the Conservation Board voted 7-1-1 to recommend approval of the application with a single condition strongly encouraging the applicant and the DRB to significantly

increase the number of proposed bike parking spaces. In a subsequent presentation to the DRB (2/14/17), the applicant indicated they will provide additional bike parking in response (see Section 8.2.5, Bicycle Parking Requirements below).

Design Advisory Board voted 3-0-0 on January 24, 2017 to support the project. Their motion:

Based on a sketch plan review with the Applicant on June 14, 2016, and project reviews on January 17 and January 24, 2017, and as a result of design revisions that the Applicant has made to the project in response to previously expressed concerns by the DAB,

The Design Advisory Board strongly supports and recommends for approval the proposed mixed use redevelopment of the existing Burlington Town Center mall site, bounded by Cherry Street to the north, Bank Street to the south, the Pine Street extension to the west, and the St. Paul Street extension to the east,

With the following conditions and suggestions (with staff response and recommendation added):

DAB Comment	Staff Response and Recommendation
<p><i>Provide a narrative to explain the methodology used to establish the average grade for purposes of demonstrating compliance with building height limits. The Average Grade may be calculated separately for each tower on Cherry Street and St. Paul Street.</i></p>	<p>While getting accurate numbers is important, regardless how the street grade is calculated it will make no difference in the compliance of the building height – all buildings are within the specified prescriptive limit.</p> <p>As a result, we cannot compel the applicant to specifically address this comment - it is purely advisory in nature.</p>
<p><i>In spite of Vermont State Statute 24 VSA 4413 (g)(1), the support structure for the rooftop PV array should be set back from the street-facing elevations to minimize the perceived height of the building, as it exceeds over the maximum allowed building height of 160'. We encourage the Applicant to revise the layout of the PV support structure in this manner in such a way that maintains an optimum amount of PV array.</i></p>	<p>Pursuant to 24 VSA 4413 (b), there is no municipal zoning jurisdiction for solar collection devices that are also subject to review by the Public Service Board under Sec. 248.</p> <p>As a result, we cannot compel the applicant to specifically address this comment - it is purely advisory in nature.</p>

<p><i>While the inclusion of an enclosed Observation deck may not be permissible as an occupied space above the maximum building height under section 5.2.6. (b), we approve of it at this location due to its public benefit.</i></p>	<p>Sec. 5.2.6 (b) Exceptions to Height Limits specifically provides exceptions for a number of rooftop structures, that while required by the Building Code to be safe for human occupancy, are not intended for continuous occupancy and use as leasable space. Additionally, a vestibule enclosing the elevator entrance is a requirement of the Building Code.</p> <p>The proposed observation deck and associated enclosure clearly fits within this category of exceptions, and any continuous occupancy and use as leasable space could be specifically prohibited as a Condition of Approval with some allowance for temporary (30-days or less) special events.</p>
<p><i>The 10-foot setback required in section 4.5.8 (c)(2)(B)(iv)(a) is currently set at approximately Elevation 271.5', continuously around all four streetfront elevations. The elevation of this setback should include more "vertical changes" as required in 4.5.8 (c)(2)(B)(ii), or "vertical variation" as described in 4.5.8 (c)(2)(A)(i). The vertical variation in this setback should be of at least a full story, and should be expressed in locations to relate to the massing of the three distinct towers above, and/or introduced at the south elevation of the south tower facing Bank Street, which would also bring the requirement for a 3rd 4th or 5th story setback in 4.5.8 (c)(2)(B)(iv)(a), into closer compliance.</i></p>	<p>The requirement to include a 10' minimum setback within the first 60' of building height from the street is in compliance. The additional requirement for this setback to be located at either the 3rd, 4th or 5th story would appear to conflict with the minimum building height requirement of 3 stories in Table 4.5.8-1 as a setback of the 3rd story would create a building wall of only 2 stories. As a result, the 10' minimum setback within the first 60' of building height from the street should be the controlling standard in this section.</p> <p>While varying the location and treatment of the required setback is an option and is encouraged within the ordinance, we cannot compel the applicant to specifically address this comment - it is purely advisory in nature.</p>

<p><i>The top of the South Tower shall have an expression of the building's top involving a projection from the plane of the façade of at least 6 inches, as required in section 4.5.8 (c)(2)(B)(viii), and this expression shall occur at the top of the uppermost occupied floor, not at the top of the mechanical penthouse.</i></p>	<p>The standard requires an expression of the building's top involving a projection from the plane of the façade of at least 6 inches, but does not specify where on the top of this building such an expression should occur.</p> <p>As a result, we cannot compel the applicant to specifically address this comment - it is purely advisory in nature.</p>
<p><i>The interior parking layout shall be arranged to avoid dead-end driveways; to avoid parallel parking spots; and to allow for safe pedestrian passage from parking spaces to stairs and elevators, to fully comply with Article 8.</i></p>	<p>Requirements regarding the layout, design and circulation of parking remains subject to any associated requirements as may be specified in Article 6 or Article 8 provided they do not conflict with the new Sec. 4.5.8 (c) 4.</p> <p>As a result, the applicant is expected to take the steps necessary to address these comments.</p>

I. FINDINGS OF FACT

Evidence Presented: Based on materials submitted and examined in support of this request during Public Hearings on February 7, 14, and 21, 2017, the Burlington Development Review Board hereby issues the following Finding of Fact relative to this application:

Article 2: Administrative Mechanisms

Part 7: Enforcement, Sec. 2.7.8, Withhold Permit

A number of zoning permits have been approved for the subject property, and not all of them have final certificates of occupancy. Per this section, prior to issuance of a final certificate of occupancy for this proposed development, any zoning permits not yet closed out with final certificates of occupancy must be addressed. **(Affirmative finding as conditioned)**

Article 3: Applications and Reviews

Part 3: Impact Fees, Section 3.3.2 Applicability

Impact Fees will be calculated for the gross new area, with credit given for existing area. The applicant shall confirm existing area (for a credit) and proposed area/uses for staff calculation of required Impact Fees. Projects containing newly constructed units that are affordable for households as described within this section are eligible for a waiver of impact fees for that portion of the project. The applicant is encouraged to consult with the Housing Trust Fund Manager to identify area and potential waiver allowance. **(Affirmative finding as conditioned)**

Section 3.3.8 Time and Place of Payment

(a) New Buildings: Impact fees must be paid at least seven (7) days prior to occupancy of a new building or any portion thereof. (Affirmative finding as conditioned)

Part 5 Major Impact Review, (b) Major Impact Review Standards

1. Not result in undue water, air, or noise pollution;

See Section 6.0 of application materials. The project will manage stormwater runoff via filtering through a green roof, streetscape stormwater treatment features (pervious pavers and vegetated filtration planters) and attenuated storage in below grade holding tanks. See Sec. 6.1 of the project submission documents and CDO Section 5.5.3 for further discussion of stormwater management. Final approval of the system design by the City's Stormwater Program will be required. See analysis of noise/dust, Section 5.5 and Figure 5-C, 5-D, and 6-A. **(Affirmative finding as conditioned)**

2. Have sufficient water available for its needs;

The anticipated increase in domestic water demand for this project is roughly 100,000 gallons per day. Burlington Department of Public Works has provided communication assuring that there is sufficient reserved water supply available for this project. Final approval of the system design by the City's Water Resources Division will be required. **(Affirmative finding as conditioned)**

3. Not unreasonably burden the city's present or future water supply or distribution system;

The project site has existing waterline to the north and south with a new municipal waterline proposed in the new section of Saint Paul Street to the east. The new line will improve the downtown distribution system connectivity. Final approval of the system design by the City's Water Resources Division will be required. **(Affirmative finding as conditioned)**

4. Not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result; See Sec. 5.5.3.

5. Not cause unreasonable congestion or unsafe conditions on highways, streets, waterways, railways, bikeways, pedestrian pathways or other means of transportation, existing or proposed;

The reconnection of St. Paul Street and Pine Street between Cherry and Bank will restore the original grid network in the downtown; providing an increase in circulation paths around the project site. This is within the downtown, where exists a dense network of sidewalks, paths, bicycle corridors and a street web that accommodate many opportunities for passage. Additionally, the recently completed Downtown Transit Center is immediately adjacent to the project site, completing the link to mass transit. Reference is made to the submitted Traffic Impact Study, and Section 6.5 of the submission (p. 18, narrative.) The Department of Public Works in a letter dated February 21, 2017 from Norman J. Baldwin, City Engineer/Ass't Director of DPW and Laura K. Wheelock, P.E. Public Works Engineer to the City of Burlington Planning & Zoning and to Don Sinex, BTC/Devonwood, indicated that it had reviewed the applicant's traffic impact study and found that the impacts from this development can be absorbed by the city's street network, and that impact on levels of service, queue length and overall delay at several key intersections are minor or moderate. We incorporate into our findings the conclusions, recommendations

and comments made by DPW in the sections of this letter titled “Traffic Impact Study (ITS),” pages 2-3; and “Progress Plans Dated 12.5.16 with revisions through 2/16/2016,” pages 3-4. Final approval of the street and streetscape design by the City’s Public Works Department will be required. Impact fees will be paid. **(Affirmative finding as conditioned)**

6. Not cause an unreasonable burden on the city’s ability to provide educational services;
See Section 6.6 in submission materials for enhanced discussion. An estimated number of school age children in this development is 18. This represents less than ½ % of the current enrollment and should not cause an unreasonable burden on the City’s ability to provide educational services. Communication from Burlington School District confirms an ability to provide services to the anticipated new student count from this development. (Letter dated February 14, 2017.) Impact fees will be paid to help offset impacts on the school system. **(Affirmative finding as conditioned)**

7. Not place an unreasonable burden on the city’s ability to provide municipal services;
All affected City Departments (Parks & Recreation, Fire, Police, Electric, CEDO, Planning & Zoning, School, and Public Works) have been involved in the review of this project and have participated in interdepartmental Technical Review (January 14, 2016). Ability to serve letters are required to assure departmental satisfaction of the plan. Assurance of services has been received from Burlington Electric Department, Burlington Telecom, Parks and Recreation, Burlington School Department, the fire marshal’s office, Burlington Police Department and Vermont Gas. The Department of Public Works has provided a letter assuring adequate water and sewer capacity for the proposed development. Any new impacts on city services will be offset through the payment of required Impact Fees. **(Affirmative finding as conditioned)**

8. Not have an undue adverse effect on rare, irreplaceable or significant natural areas, historic or archaeological sites, nor on the scenic or natural beauty of the area or any part of the city;
The project site is a city block that was razed and reconfigured during Burlington’s 1960’s Urban Development plan. It was at that time that the segments of St. Paul and Pine Streets were eliminated in favor of a larger redevelopment site. The site is significantly disturbed and all original buildings removed earlier.

Although the south side of Bank Street is within the Church Street Historic District and includes historic structures, the development parcel itself was assessed in 2003 and 2008 during preparation of the Church Street Historic District nomination and was deemed ineligible for listing on the National Register of Historic Places. The existing retail mall has no historic significance.

The project area remains within an existing streetscape that includes large, multistory newer construction (100 Bank Street on the west, 150 Bank and 76 St. Paul (Keybank) on the east/southeast.) Development at 75 Cherry Street will restore sections of Pine and St. Paul Street (original circulation prior to Urban Renewal), returning the travel pattern consistent with its earlier configuration. There will be no shadow impacts on the south side of Bank Street from the proposed development. Existing historic structures along Bank Street, which have faced modern infill for 40+ years will remain undisturbed, unaltered and intact. New development will enhance the streetscape, providing a more enjoyable pedestrian experience; restore original traffic circulation patterns and replace non-historic development that has deadened the

street wall on Bank Street. The project proposes no undue adverse effect on rare, irreplaceable or significant natural areas, historic or archaeological sites, or scenic or natural beauty of the area.

(Affirmative finding)

9. Not have an undue adverse effect on the city's present or future growth patterns nor on the city's fiscal ability to accommodate such growth, nor on the city's investment in public services and facilities;

The proposed redevelopment is located within the city's downtown core; an area targeted for high intensity mixed use development. The project is consistent with many of the goals identified in *PlanBTV* and the Municipal Development Plan relative to concentrated growth in the urban core. City infrastructure improvements to support the project are linked to Tax Increment Financing (TIF), approved by the voters November 8, 2016. Impact Fees will be assessed to address additional related impacts of the redevelopment. **(Affirmative finding as conditioned)**

10. Be in substantial conformance with the city's municipal development plan;

An entire section of *PlanBTV* is dedicated to the redevelopment of the downtown mall and potential improvements. The plan calls for creation of additional downtown housing, reconnecting the street grid (cut off during urban renewal), new strategic infill, and improved street life particularly along Cherry Street and Bank Street. The proposed redevelopment addresses each of these targeted items. The application proposes 272 dwelling units in a variety of studio, 1-, and 2-, -bedroom units. Pine Street and St. Paul Street are to be reconnected. The proposed project is a comprehensive redevelopment of an entire city block; re-framed by Pine and St. Paul Streets. The redevelopment introduces a mix of uses and streetscape improvements on all four street frontages.

Additionally, the proposal complements the Municipal Development Plan in other specific areas:

- *This area (Urban Renewal District) should be the site of intensive mixed-use development including housing, hotels, a small to medium sized conference center, and public space...mid-block pathways and public greenspace must be included to facilitate pedestrian and bicycle circulation north-south and east-west....the City may consider re-introducing one or more through streets within portions of the urban renewal area in order to ease the flow of traffic through downtown by improving north-south circulation. [MDP, Land Use Plan, Page I-14-15.]*
- *Strengthen the City Center District with higher density, mixed use development. [MDP, Land Use Plan, Page I-2.]*
- *Target new and higher density development into the Downtown, Downtown Waterfront, Enterprise District, Institutional Core Campuses, and Neighborhood Activity Centers [MDP, Land Use Plan, Page I-2.]*
- *Guide a higher proportion of future development into the city center and neighborhood activity centers [MDP, Natural Environment, page II-2.]*
- *Enhance the City's gateways and streetscapes [MDP, Built Environment, Page III-1.]*
- *Enhance the pedestrian experience by improving opportunities for pedestrian access and interaction throughout the city [MDP, Built Environment, Page III-2.]*

- *Ensure people with disabilities have equal access to the built environment* [MDP, Built Environment, Page III -2.]
- *Ensure building design and public amenities take into account Burlington's northern climate* [MDP, Built Environment, Page III-2.]
- *Promote and strengthen a mixed economy and work actively to retain existing businesses and jobs* [MDP, Economic Development Plan, Page VI-2.]
- *Invest in the necessary public improvements, particularly transportation, to strengthen the Downtown, both as a Regional Growth Center and as city neighborhood.* [MDP, Economic Development Plan, Page VI-2.]
- *Encourage a healthier regional balance of affordable housing in each community, proximate to jobs and affording mobility and choice to low income residents.* [MDP, Housing Plan, Page IX-1.]
- *Support the development of additional housing opportunities within the city, with concentrations of higher-density housing within neighborhood activity centers, the downtown and institutional core campuses.* [MDP, Housing Plan, Page IX-1.]

(Affirmative finding)

11. Not have an undue adverse impact on the present or projected housing needs of the city in terms of amount, type, affordability and location;

PlanBTV: Downtown & Waterfront calls for more housing downtown generally and specifically within the mall property. The submitted redevelopment application identifies a total of 272 housing units broken down as follows:

- 121 2 bedroom apartments
- 116 One bedroom apartments
- 35 studio apartments

Of the total, 55 units (24 2- bedroom, 24 1- bedroom, and 7 studios) will be permanently affordable. This constitutes more than 20% IZ. Satisfaction of the requirements of Article 9 will be required via a letter of Compliance from the city's Housing Trust Fund Manager. **(Affirmative finding as conditioned)**

12. Not have an undue adverse impact on the present or projected park and recreation needs of the city.

Residents of the new dwelling units and even employees within the new commercial spaces will likely utilize the city's park and recreation facilities. Park impact fees will be paid to help offset any related impact on park needs. An ability to serve letter has been obtained from the Department of Parks & Recreation. **(Affirmative finding)**

(c) Conditions of Approval:

1. Mitigation measures, including but not limited to screening, landscaping, where necessary to reduce noise and glare and to maintain the property in a character in keeping with the surrounding area.

A dust mitigation plan for construction work is included within the application. (Figure 6-A, submission materials.) Construction would involve equipment typical of mixed-use development in the area, and would not occur between the hours of 9:00 pm and 7:00 am which is prohibited by the Burlington Noise Code (Section 21-13.)

Trash, recycling and loading area are proposed within an interior bay accessed from Bank Street; a design feature that should minimize any potential noise impacts from those activities.

Mechanical equipment is proposed to be enclosed within a rooftop penthouse, significantly reducing the potential for noise impacts.

While the development is anticipated to increase traffic volumes (see Traffic Impact Study), the increase in noise is anticipated to be negligible (less than .2 dB) for traffic sources.

Noise monitoring will be on-going on site. (Figure 5-D.)

VHB's noise assessment concluded that the proposed development would not result in adverse noise impact according to Burlington's Noise Code as it relates to stationary sources. See Figure 5-c and 5-d of submission materials. **(Affirmative finding)**

2. Time limits for construction.

Construction and occupancy are anticipated to occur in multiple phases, with occupancy between March 2019 through June 2020. The applicant has submitted a revised construction phasing schedule (February 16, 2017) requesting a three-year construction/permit life. Additionally, the occupancy schedule is as listed below. Breaking the project into distinct phases will allow occupancy of buildings, or even sections within buildings, as they are completed while construction of others is ongoing. As outlined in that 2.16.2017 document:

- 1st Phase of occupancy: (9.1.2019)
 - ◆ UVMMC Office Space
 - ◆ Parking Garage Levels P + 12
 - ◆ Cherry St + Bank Street improvements
 - ◆ Retail Space, Bank + Cherry Streets

- 2nd Phase of occupancy (6.30.2020)
 - ◆ Residential Tower, East Wing (103 units)
 - ◆ Residential L3, L4+L5 (61 units, includes inclusionary)
 - ◆ Bank Street office tower
 - ◆ Parking Garage Levels L3 + L4

- 3rd Phase of occupancy (8.1.2020)
 - ◆ Residential Tower; Center + West Wings (109 units)
 - ◆ Retail Space; St. Paul + Pine Streets
 - ◆ St. Paul and Pine Street improvements

Any phasing schedule is at the discretion of the DRB. **(Affirmative finding as conditioned)**

3. Hours of operation and/or construction to reduce the impacts on surrounding properties.

The applicant has requested an aggressive program with construction proposed to occur 7 days/week. Per that request:

- Proposed normal work hours

- ◆ M-F 7:00 am – 7:00 pm
- ◆ Saturday and Sunday 7:00 am – 4:00 pm.
- Proposed extended work hours
 - ◆ (4) 24- hour periods per month throughout the duration of the project utilized for long-duration (concrete finishing), large equipment hoisting (MEP) or other items that require longer than normal work hours.
 - ◆ Relieves daytime impacts during holidays, peak tourist and/or event periods.

Monday through Friday construction shall be limited to 7am to 7pm.

Saturday construction, including exterior work, from 7am-4pm is acceptable in order to help shorten the overall construction period, and up to 4 24-hr periods per month is acceptable after consultation with DPW and CEDO to minimize disruption of downtown residents, events and businesses. No construction activity shall occur on Sundays.

Prior to release of the zoning permit, the applicant shall present to staff a plan for use of shuttles and remote parking by no less than 50% of construction workers as presented during the Public Hearing to minimize impact on downtown parking resources.

None of the proposed uses (retail, restaurant, office, daycare and residential) are conditional. Therefore, limitations of days and hours of operation are not warranted. **(Affirmative finding as conditioned)**

4. That any future enlargement or alteration of the use return for review to the DRB to permit the specifying of new conditions;

Any future enlargement or alteration will be reviewed under the zoning regulations in effect at that time. **(Affirmative finding as conditioned)**
and,

5. Such additional reasonable performance standards, conditions and safeguards, as it may deem necessary to implement the purposes of this chapter and the zoning regulations. This remains at the discretion of the DRB.

Article 4: Zoning Maps and Districts

The mall property is located within the Downtown Zoning District and within the Downtown Mixed Use Core Overlay, adopted by City Council September 29, 2016 and the voters on November 8, 2016.

Section 4.2.2 Downtown and Waterfront Core Official Map Established

(h) The re-establishment of St Paul Street between Cherry and Bank streets as a public street with a right-of-way sixty (60) feet in width to accommodate pedestrians, bicycles and vehicles; and,

(i) The re-establishment of Pine Street between Cherry and Bank streets as a public street with a right-of-way sixty (60) feet in width to accommodate pedestrians, bicycles and vehicles.

The project as proposed includes two new city street segments - St Paul Street between Cherry and Bank, and Pine Street between Cherry and Bank – as required. **(Affirmative finding)**

Section 4.3.2 Overlay Districts Established

(h) A Downtown Mixed Use Core (DMUC) district.

Please see attached compliance checklist.

Sec. 4.4.1, Downtown Mixed Use Districts:

(a) Purpose

(1) Downtown District (D)

The subject property is located in the Downtown (D) District. This zone is the primary urban center of Burlington. As noted previously, high intensity development with large, tall buildings and a diversity of uses is anticipated. Emphasis has been placed on creating pedestrian friendly streetscapes with human scale components. **(Affirmative finding)**

(b) Dimensional Standards & Density

See Compliance Checklist for DMUC Overlay, Section 4.5.8, below.

(c) Permitted & Conditional Uses

The proposed residential, retail (including restaurant), daycare and office uses are permitted in the Downtown zone. The size of the project triggers “major impact” review. **(Affirmative finding)**

(d) District Specific Regulations

1. Use Restrictions

A. Ground Floor Residential Uses Restricted

No residential units are proposed along the ground floors of the proposed development. **(Affirmative finding)**

2. Public Trust Restrictions

The subject property is not located within the Public Trust. **(Not applicable)**

3. Facades and Setbacks on Side and Rear Property Lines

This criterion requires that new buildings placed on a side or rear property have no doors or windows along such façade. It also requires a 10’ setback for new construction where the façade of an existing adjacent principal building is within 5’ of a common property line and has existing doors or windows. The new development meets the required 10’ setback from 100 Bank Street. See Plan A-202. **(Affirmative finding)**

4. Building Height Setbacks

A. Principal View Corridors

The proposed development parallels Cherry Street – an identified view corridor. The Downtown Mixed Use Core overlay district specifies building setbacks. See Section 4.5.8, below.

B. Church Street Buildings

(Not applicable)

C. Side Street Building Height

See Compliance Checklist, Section 4.5.8.

5. Lake Champlain Waterfront Setbacks

The subject property is not located along the Lake Champlain waterfront. **(Not applicable)**

6. Development Bonuses/Additional Allowances

See Compliance Checklist, Section 4.5.8. Building height is allowed by right.

Section 4.5.8 Downtown Mixed Use Core Overlay (DMUC) District

(b) Areas covered

75 Cherry Street is within the overlay district. The Macy's building to the west of this proposed redevelopment is a separate property under separate ownership, and therefore is not the subject of this application and review. The separation of the buildings to accommodate the new Pine Street segment will however likely trigger the necessity for a new zoning permit for modifications to the eastern façade of Macys by that property owner at an appropriate time. **(Affirmative finding)**

(c) District Specific Regulations: Downtown Mixed Use Core Overlay (DMUC) District

See the attached Downtown Mixed Use Core Overlay Compliance Checklist. **(Affirmative finding as conditioned)**

Article 5: Citywide General Regulations

Sec. 5.2.3, Lot Coverage Requirements

See Article 4 above.

Sec. 5.2.4, Buildable Area Calculation

Not applicable in the D zone.

Sec. 5.2.5, Setbacks

(a) Setbacks Required

See Article 4 above.

(b) Exceptions to Yard Setback Requirements

1. Abutting Building with Doors or Windows

This criterion requires a setback of 10' for new construction abutting an existing building within 5' of the property line that has windows or doors facing the new construction. Project plans revised as of 01/20/2017 comply with this criterion. Previously, construction abutting the existing building at 100 Bank Street had encroached into this setback. **(Affirmative finding)**

Sec. 5.2.6, Building Height Limits

(b) Exceptions to Height Limits

- 1. Additions and new construction on parcels created prior to January 1, 2008 that contain a non-conforming principal building exceeding the maximum permitted building height may exceed the**

maximum permitted building height of the zoning district subject to the design review provisions of Art. 3 and 6, but in no event shall exceed the height of the existing non-conforming principal building. (Not applicable)

2. *In no case shall the height of any structure exceed the limit permitted by federal and state regulations regarding flight paths of airplanes.*

As the proposed construction is not located at an airport, the threshold for FAA review appears to be 200' tall per 14 CFR Part 77.9. The proposed construction is less than 200' tall. **(Affirmative finding)**

3. *Ornamental and symbolic architectural features, including towers, spires, cupolas, belfries and domes; greenhouses, garden sheds, gazebos, rooftop gardens, terraces, and similar features; and fully enclosed stair towers, elevator towers and mechanical rooms, where such features are not used for human occupancy or commercial identification, are exempt from specific height limitations but shall be subject to the design review provisions of Art. 3 and 6. Such features and structures shall be designed and clad in a manner consistent and complementary with the overall architecture of the building.*

The enclosed rooftop mechanical penthouse atop the south tower also includes an enclosed observation deck. This penthouse exceeds the standard 160' height limit. As noted in their recommendation to the DRB, the Design Advisory Board supported inclusion of this feature in the building design. The space is open to the public – as an observation deck – it is not occupied space in the typical sense (office, residence, etc.). In light of the benefit of this public amenity, allowing it to share space within the mechanical penthouse is reasonable. **(Affirmative finding)**

4. *Exposed mechanical equipment shall be allowed to encroach beyond the maximum building height by no more than 15-feet provided that portion exceeding the height limit does not exceed 20% of the roof area.*

Exposed mechanical equipment shall be fully screened on all sides to the full height of the equipment, and positioned on the roof to be unseen from view at the street level. Screening may consist of parapets, screens, latticework, louvered panels, and/or other similar methods. Such features and structures shall be designed and clad in a manner consistent and complementary with the overall architecture of the building

Where mechanical equipment is incorporated into and hidden within the roof structure, or a mechanical penthouse setback a minimum of 10-ft from the roof edge, no such area limit shall apply and the structure shall be considered pursuant with 4 above.

Rooftop equipment is fully enclosed within a mechanical penthouse. As required, the penthouse observes a 10' setback from the roof edge. **(Affirmative finding)**

5. *All forms of communications equipment including satellite dish antennae shall not be exempt from height limitations except as provided in Sec 5.4.7 of this Article. (Not applicable)*

6. *The administrative officer may allow for up to a 5% variation in the maximum building height to account for grade changes across the site. In no event however, shall such additional height enable the creation of an additional story beyond the maximum permitted.*

The maximum building height of the proposed construction varies between 158' and 162' 2". The 2' 2" over 160' is within 5% and is allowable. **(Affirmative finding)**

Sec. 5.2.7, Density and Intensity of Development Calculations

See Article 4 above.

Section 5.4.8 Historic Buildings and Districts

75 Cherry Street / Burlington Town Center Mall was evaluated during the preparation of the Church Street Historic District nomination to the National Register of Historic Places in 2003 and 2008. It was confirmed that the property is not eligible for the National Register, and has been deemed non-contributing to the nomination. The project development therefore does not meet applicability standards of this section. **(Not applicable)**

Sec. 5.5.1, Nuisance Regulations

No part of the application indicates that nuisance impacts may result. No industrial or other commercial uses typically associated with heat, glare, emissions, or noise are included in the application. The application materials include an evaluation of potential noise impacts relative to Burlington's noise ordinance. Parking areas, trash/recycling facilities, and loading docks will be internal to the proposed building, thereby limiting outdoor noise. Mechanical equipment will be located on the rooftops within fully enclosed penthouses. Noise from mechanical units will, therefore, be substantially less than ground mounted and/or unenclosed mechanical units. **(Affirmative finding)**

Sec. 5.5.2, Outdoor Lighting

New outdoor lighting is included in this proposal. New pole-mounted lights are proposed within the public street rights-of-way. A fixture cutsheet has been provided, and illumination levels are depicted in a photometric plan for the site. The application asserts that the new streetlights comply with Burlington Electric Department's central business district lighting standards. Final written acceptance from BED is needed. Other lighting includes building entryway lighting and under-canopy lighting. Cutsheets are provided for both fixtures. Both are acceptable cutoff LED fixtures; however, only one fixture (BEGA 66 698 for entries) is included in the photometric plan. Footcandle levels for both fixtures are needed. The most current photometric plan depicts acceptable illumination levels at all building entries. Parking garage lighting has been partially addressed with provision of a fixture cutsheet. An acceptable LED fixture is proposed. Illumination levels are lacking and must be provided to ensure compliance with Sec. 5.5.2 (f). The light source(s) of interior lighting within the parking garage should be shielded from view from street-level public vantage points. **(Affirmative finding as conditioned)**

Sec. 5.5.3, Stormwater and Erosion Control

A comprehensive stormwater management plan is included in this proposal. Presently, there is virtually no onsite stormwater management. Runoff flows without attenuation into the city's receiving sewers. As

proposed, the ~3.5-acre project site will be overhauled to capture and attenuate stormwater flows to green meadow conditions prior to discharge into the city system. Doing so will be of significant benefit to the city's receiving system. The proposal includes large underground cisterns to capture most of the flows and sand filters to treat stormwater prior to discharge at a controlled rate into the city system. Green roofs are also included. They, too, will capture and control release of stormwater with the added benefit of evapotranspiration. On the ground, areas of pervious pavement, in combination with oversized soil chambers for new street trees, will also capture and attenuate stormwater. The Conservation Board reviewed this proposed stormwater management plan and recommended approval. Final approval by the city's stormwater program is required.

A detailed construction site erosion prevention and sediment control (EPSC) plan is included in the project plans. It, too, has been reviewed and approved by the Conservation Board. It includes a variety of standard EPSC practices. The application also contains a comprehensive dust control plan to limit offsite impacts associated with construction and earth disturbance. As with stormwater management, the EPSC plan is subject to final approval by the city's stormwater program. **(Affirmative finding as conditioned)**

Article 8: Parking

Section 8.1.3 Parking Districts

Located in the Downtown Zoning District, this project is subject to the off-site parking requirements of the Downtown Parking District.

Sec. 8.1.8, Minimum Off-Street Parking Requirements

See Section 2.8, p. 6 of the applicant's narrative.

Calculated for Downtown District

Use	Area	Requirement	Total required	Proposed
Retail	107,304 sf	0	0	0
Office	230,328 sf	2 per 1000 sf	461	489
Residential	272 units	1 per unit	272	272
Preschool/Daycare	19,509	2 drop off	2	As required
Total			735	761
Required accessible parking 2%			15	16

The applicant is required to identify the 2 preschool drop-off parking spaces on a parking deck plan as appropriate. **(Affirmative finding as conditioned)**

Section 8.1.9 Maximum Parking Spaces

The number of spaces provided does not exceed 125% of the required parking as calculated for the Neighborhood Parking District. Total number provided: 761. As calculated for the Neighborhood Parking District: (and depending upon size of daycare), approximately 1337 parking spaces could be

provided under the maximum. The proposal does not exceed 125% of the minimum number of parking spaces required for the Neighborhood Parking District. **(Affirmative finding)**

C. Exemptions

Although the provided parking minimally exceeds the parking requirement for the Downtown parking district, the additional spaces are not counted toward the parking maximum limitation as they are within a parking structure. **(Affirmative finding)**

Section 8.1.14 Stacked and Tandem Parking Restrictions

The applicant will provide a written commitment that a parking attendant will be present when the garage is in operation. The garage will be open 24 hours a day, 7 days a week. Stacked and valet stalls will be signed and striped to distinguish from open stalls. An attendant will be available on each floor where stacked parking is being utilized. The attendant will park the tenant/visitor’s car and provide the vehicle owner a valet slip for retrieving the car. Tenants using valet service will be directed to a spot on each floor to drop the car off for an attendant. Signs at each entrance will direct a customer to the valet stand. **(Affirmative finding as conditioned)**

Section 8.2.5, Bicycle Parking Requirements

Use	Area	Required Bike Parking			
		Long Term		Short Term	
Retail	126,813	1 per 20,000 sf	7	1 per 5,000	26
Office	230,328	1 per 5,000	46	1 per 10,000	23
Residential	272 units	1 per 4	68	1 per 10	27
Total Required		121		50*	
Total Proposed		175		60	

**Section 8.2.5 (c) Where bicycle parking is required, the minimum number of bicycling parking spaces provided at each site shall be 2 (2) and the maximum shall be fifty (50, not including long term parking.*

Long term bicycle parking is located on floors 2-5 of the parking area, adjacent to the Pine Street parking pedestrian access. Facilities include showers and changing accommodation. Short term spaces are located on the streetscape, adjacent to major entry points. Please refer to Plan LA200. Placement within the public right-of-way will require approval of the Department of Public Works and a license agreement with the city, with ultimate approval by City Council. **(Affirmative finding as conditioned)**

Article 9: Inclusionary and Replacement Housing

Sec. 9.1.5, Applicability

As the proposed development includes more than 5 new dwelling units, it is subject to the inclusionary housing provisions of this Article. In this case, a total of 272 residential units is proposed. Typically, 15% of housing units must be inclusionary, but this number may vary depending on price points of the market-rate units. This application proposes 55 inclusionary units (20% of the total) to be integrated throughout the residential portion of the development. Final written approval of the inclusionary housing

approval from the manager of the city's Housing Trust Fund is required. (**Affirmative finding as conditioned**)

Sec. 9.1.17, Review of Proposal for Phasing

The application contains a phasing schedule (figure 5-B) that articulates 3 distinct phases. Phases 2 and 3 include all of the residential units. The inclusionary units are interspersed throughout the residential components of the development. Per this criterion, they must be made available for occupancy on a schedule concurrent with the market-rate units. (**Affirmative finding as conditioned**)

Sec. 9.1.18, Timeline for Availability/Phasing of Inclusionary Units for Issuance of Certificate of Occupancy

See Sec. 9.1.17 above.

Article 10: Subdivision

Sec. 10.1.15, Lot Line Adjustments

No subdivision is included in this proposal. Lot lines; however, will be adjusted. Six existing parcels will be reconfigured into five parcels. As required, a boundary survey by a VT licensed land surveyor has been provided. No nonconforming parcels result from the proposed lot line adjustments. All reconfigured parcels have street frontage. There is no minimum lot size requirement in the Downtown zone or within the Downtown Mixed Use Core Overlay. A mylar of the lot line adjustment, signed by the Zoning Administrator, shall be filed within the city's land records within 180 days of approval. (**Affirmative finding as conditioned**)

Sec. 10.1.10 Performance Bond and Guarantee of Completion

As new public improvements (city streets and related infrastructure) are included in this project, this criterion call for a performance guarantee. (**Affirmative finding as conditioned**)

Sec. 10.1.12 Dedication of Public Streets

As new public streets are included in this project, procedures for acceptance outlined in this section must be followed. (**Affirmative finding as conditioned**)

II. MINUTES

The meeting minutes will be distributed separately upon review and approval by the Development Review Board.

III. MOTION

Motion:

I move that the Board grant certificate of appropriateness and major impact approval for the mixed use redevelopment of the existing Burlington Town Center mall site and associated lot line adjustments for

the property at 75 Cherry Street in the D zone (DMUC overlay) in accordance with Articles 2, 3, 4, 5, 6, 8, 9, and 10. Approval is subject to the following conditions:

Conditions of Approval

1. **Within 180 days of approval**, a mylar of the lot line adjustment, signed by the Zoning Administrator, shall be filed within the city's land records.
2. **Prior to release of the zoning permit**, the following items shall be provided, subject to staff review and approval:
 - a. 2 preschool drop-off parking spaces identified on a parking deck plan as appropriate;
 - b. A revised photometric plan that depicts lighting levels from all outdoor lighting fixtures;
 - c. Illumination levels within the parking garage, and demonstration that interior lighting within the parking garage shall have its light source(s) shielded from view from street-level public vantage points;
 - d. A memo clarifying the nature of the relationship between the Burlington Town Center and Devonwood Investors, and the ownership of the property proposed for redevelopment, including documentation that Don Sinex is authorized to act for BTC Mall Associates, LLC;
 - e. A written guarantee that parking attendants will be present when the garage is in operation per Section 8.1.14;
 - f. Written acceptance of the proposed street lights from Burlington Electric Department; and,
 - g. Documentation of DMUC overlay applicable Urban Design Standards compliance in the form of elevation drawings and cross-sections for the affected westerly façade of the remaining mall building following demolition.
3. **Prior to release of the zoning permit**, the stormwater management plan, erosion prevention and sediment control plan, and water and wastewater plans shall receive final written approval from the City's Public Works Water Resources Division.
4. Impact fees must be paid at least seven (7) days prior to issuance of a **Final Certificate of Occupancy** of a new building or phase. Impact Fees will be calculated for the gross new area, with credit given for existing area. The applicant shall confirm those uses/areas for staff to calculate appropriate fees. Impact fees may be paid by project phase.
5. **Prior to release of the zoning permit**, written approval of the inclusionary housing proposal by the manager of the city's Housing Trust Fund shall be obtained.
6. **Prior to issuance of the Final Certificate of Occupancy**, any zoning permits not yet closed out with final certificates of occupancy must be closed out or superseded as needed.
7. **Prior to issuance of the Final Certificate of Occupancy**, the applicant shall provide revised construction costs for all private and public improvements included in this project, and may be subject to additional permitting and development review fees.
8. **Prior to issuance of the Final Certificate of Occupancy**, the following shall be required:

- a. the submission of revised as-built performance criteria and project elements necessary to obtain the required green building certification (e.g. LEED checklist);
 - b. the results of 3rd party commissioning of the building envelope and mechanical systems documenting compliance of as-built performance; and,
 - c. a written certification from the project design professional of record that the project has been constructed to comply with the green building requirements of this section.
9. The permit period shall be for **three years from the date of decision**. This approval incorporates the 3-phase “Construction Phasing” schedule included in the application. Certificates of occupancy may be obtained for each separate phase as the project is under construction.
10. Construction hours shall be limited as follows:
- (a) Monday through Friday construction shall be limited to 7am to 7pm;
 - (b) Saturday construction, including exterior work, from 7am-4pm is acceptable in order to help shorten the overall construction period;
 - (c) Up to 4 24-hr construction periods per month is acceptable after consultation with DPW and CEDO to minimize disruption of downtown residents, events and businesses;
 - (d) No construction activity shall occur on Sundays; and,
 - (e) **Prior to release of the zoning permit**, the applicant shall present to staff a plan for use of shuttles and remote parking by no less than 50% of construction workers as presented during the Public Hearing to minimize impact on downtown parking resources.
11. Per the requirements of Sec. 10.1.10, *Performance Bond and Guarantee of Completion*, a performance guarantee for all new public improvements shall be provided, subject to review and approval by the City Attorney.
12. As new public streets are included in this project, procedures for acceptance outlined in Sec. 10.1.12, *Dedication of Public Streets*, must be followed.
13. Any and all construction within the public street right-of-way, including Bay Windows, awnings and canopies that project out over the public ROW, are subject to review and approval of the Dept. of Public Works and encumbrance permitting by the City Council as applicable.
14. The following requirements of the Department of Public Works are incorporated into these conditions of approval:
- a. Bank Street and Cherry Street - The proposed improvements as shown in the submitted plan meet or exceed City Standards as currently specified with the following exceptions, notes, or comments:
 - i. The applicant is normally responsible for the reconstruction of existing public infrastructure within the project's limits of construction. Given that the project applicant is partnering with the City to comprehensively redevelop the adjacent

- streets at the same time, it is understood that there will be a future agreement to identify an equitable cost sharing of these restoration costs.
- ii. The parking garage exit/entrance on both Bank Street and Cherry Street shall have audio and visual warnings displayed for pedestrians on the street when a vehicle is entering/existing the structure.
 - iii. The bicycle racks shown that are intended to accommodate the project's short term bicycle parking shall be owned and maintained by the Applicant, the applicant shall seek approval for use of the ROW by the City Council.
 - iv. Applicant to work with DPW and Green Mountain Transit to review travel lane widths and intersection control and geometries for possible transit routing on St. Paul Street.
 - v. Concrete sidewalk shall be 5" thick minimum and 8" thick at commercial driveways.
- b. Project Streets (Pine Street and St. Paul Street) - The proposed improvements as shown in the submitted plan meet or exceed City Standards as currently specified with the following exceptions, notes, or comments:
- i. Minimum clearance between the top of road on Pine Street and bottom of the 100 Bank Street building shall be 12'-6" minimum. Warning bars shall be placed in advance of this low clearance with signage and height indicating bar to warn trucks of low clearances.
 - ii. Concrete sidewalk shall be 5" thick minimum and 8" thick at commercial driveways.
- c. General Comments:
- i. Applicant will be required to place monuments at all parcel boundaries.
 - ii. All public infrastructure intended to be part of the dedication must be within the proposed limits of the ROW.
 - iii. Any materials used in the ROW that exceed City Standards will be the responsibility of the Applicant, and the Applicant will be required to enter into a License Agreement with DPW, unless otherwise waived, for the care, maintenance, replacement, removal for the life that material unless otherwise replaced with a Standard material, at which time the Agreement can be dissolved.
 - iv. For the dedication process the Applicant must, at minimum, provide the following:
 1. As-built drawings of all infrastructure in the ROW.
 2. Certification from the engineer of record that infrastructure constructed was completed per plans and specification.
 3. All documentation by the project resident engineer for all infrastructure in the ROW. This shall include but is not limited to: Notes, photographs, reports, quality control testing, change orders, submittals.
 - v. The City shall be invited to participate at all construction meetings.

- vi. The City shall have the right to have oversight during construction, review of resident engineer documentation, submittals.
15. Street-facing, street-level windows must allow views into a ground story non-residential use for a depth of at least 3 feet for the first 4 feet above the level of the finished sidewalk in order to provide for a window display, and for a depth of at least 8 feet for the next 4 feet above the level of the finished sidewalk in order to provide a view into the interior of the space. Windows cannot be made opaque by window treatments (except operable sunscreen devices within the conditioned space).
16. The rooftop observation deck shall be publically accessible during normal business hours, and any continuous occupancy and use as leasable space shall not be permitted with the exception of temporary (30-days or less) special events.
17. A State of Vermont wastewater permit is required.
18. It is the applicant's responsibility to comply with all applicable ADA requirements.
19. All new construction is required to meet the Guidelines for Energy Efficient Construction pursuant to the requirements of Article VI. Energy Conservation, Section 8 of the City of Burlington Code of Ordinances.
20. Approval of this project is not final approval of public improvements.
21. Any outdoor signage will require a separate sign permit.
22. Standard Permit Conditions 1-15.

Second: Israel Smith

Vote: 6-0

This set of Findings is dated at Burlington, Vermont, this 17th day of March, 2017.

Respectfully Submitted,


Austin D. Hart, Development Review Board Chair

Please note that an interested person may appeal a decision of the Development Review Board to the Vermont Superior Court, Environmental Division. (Comprehensive Development Ordinance Article 12, Section 12.2.3 Appeals of Development Review Board Decisions: An interested person may appeal a decision of the Development Review Board to the Vermont Environmental Court within 30 days of the date of the written decision as follows:

(a) Notice of Appeal: The appeal shall be taken in such a manner as the Supreme Court or the environmental court may by rule provide for appeals from state agencies governed by Sections 801 through 816 of Title 3, Vermont Statutes Annotated. Notice of the appeal shall be sent by mail to every interested person appearing and having been heard at the hearing before the DRB, and, if any one or more of those persons are not then parties to the appeal, upon motion they shall be granted leave by the court to intervene.)



Office of Mayor Miro Weinberger

August 28, 2018

VIA EMAIL & U.S. MAIL

BTC Mall Associates LLC
101 Cherry Street,
Suite 440
Burlington, VT 05401
Attention: Donald Sinex

Re: City of Burlington ("City") – BTC Mall Associates LLC ("BTC")

Dear,

This letter is intended to express and confirm certain shared understandings and clarifications of the City and BTC regarding the Development Agreement dated as of October 26, 2017 made by and between the City and BTC (the "Development Agreement") and the development of the Project described therein. Capitalized terms used but not defined herein shall have the meaning set forth in the Development Agreement.

1. The City and BTC agree that the Development Agreement is in full force and effect and that no default exists as of this date under the Development Agreement.

Design and Budget of Public Improvements and Additional Public Improvements

2. The City provided BTC "with the design standards necessary for Owner to prepare construction plans and bid packages and develop a final budget for the new segments of Pine & St. Paul Streets" as required by Section 3(b) of the Development Agreement. The parties' design teams have since identified that the design standards alone are insufficient to prepare complete "construction plans and bid packages and develop a final budget for the new segments of Pine & St. Paul Streets" because the design standards do not address the intersection of the new segments of Pine Street and St. Paul Street with Bank Street and Cherry Street. Accordingly, the City agrees that BTC is not required to complete 100% plans for the new segments of Pine Street and St. Paul Street until after BTC receives from the City 30% conceptual design plans for Bank Street and Cherry Street where they intersect with the new segments of Pine Street and St. Paul Street. As required by the Development Agreement, the 30% conceptual design plans for Bank Street and Cherry Street were delivered to BTC by the City.

City Hall | 149 Church Street | Burlington, VT 05401
802.865.7272 | www.burlingtonvt.gov



3. To keep the design and construction of the Project, including the Public Improvements, on track, the parties have agreed to modify internal milestone dates and clarify other elements of the design, budgeting and bidding process as follows:

4. Design and Budget New Segments of Pine Street and St. Paul Street.

The Development Agreement requires BTC to complete the 100% plans for the new segments of Pine Street and St. Paul Street, and for the City to provide 30% conceptual design plans for Bank Street and Cherry Street by July 1, 2018. Because BTC is not able to complete a final design of the new street segments until after the conceptual designs for Bank Street and Cherry Street are complete, the parties have agreed that BTC shall complete the final design of the new street segments after the City delivers the 30% conceptual design plans for Bank Street and Cherry Street where they intersect with the new segments of Pine Street and St. Paul Street, together with conceptual design plans that modify the layout of the new segment of Pine Street to incorporate a portion of the real property numbered 2 Burlington Square (owned by People's United Bank, N.A.), and conceptual design plans that modify the layout of the new segment of St. Paul Street to incorporate a portion of the real property numbered 150 Bank St. (owned by Marsha W. Milot, Trustee).

The project area for BTC's design of the new street segments shall be between the existing rights-of-way for Cherry Street and Bank Street and shall not include the adjacent intersections, as highlighted/shaded in red on the plan attached hereto as Exhibit A and made a part hereof. Recognizing that the Public Improvements are public infrastructure, BTC shall direct its design team to receive, consider and reflect design input provided by the City's design team.

By October 31, 2018, so long as there have been no modifications to the street segment project area by the City, BTC will provide the City with 75% design plans and specifications for the new segments of Pine Street and St. Paul Street for its review. When BTC delivers the 75% design plans for the new segments of Pine Street and St. Paul Street, it will include an engineer's estimate of the cost of the work to implement the design shown on the plans and an updated schedule of related soft costs incurred to date that includes backup documentation to substantiate its reported expenditures, except where the costs are estimated in which case BTC shall provide the underlying assumptions that support the estimate, which will be in the form of a table that can be updated to reflect changes in units and quantities as the designs are refined. The City may value engineer the work to the reasonable satisfaction of the City and BTC.

The City notes that the zoning permit issued for BTC's project requires BTC to design signal improvements at the intersection of Cherry St. and St. Paul Street, which is outside of the area of BTC's design responsibilities described in this letter, and BTC's design of such improvement must be agreed upon by both parties solely in accordance with the permit.

The 75% design plans will include at a minimum:

- width and depth transitions
- roadside barriers
- cut-to-fill transitions
- drives / curb cuts
- intersections
- drainage
- erosion prevention and sediment control
- traffic signs / pavement markings
- street lighting / furniture
- street furniture
- street trees
- landscape treatments
- signalization and staging
- traffic management / detours
- cross section templates
- construction limits
- plan sheet notes
- itemized quantity sheet
- pothole located subterranean utilities

The City's review may include third party review through an independent consultant at the sole expense of the City. The City will provide BTC with feedback regarding the 75% plans within 14 days of receipt.

By January 15, 2019, BTC will provide the City with 100% design plans and specifications for the new segments of Pine Street and St. Paul Street for its review, so long as there have been no modifications to the street segment project area by the City, together with an updated engineer's estimate of the cost of the work and an updated schedule of related soft costs incurred to date that includes backup documentation to substantiate its reported expenditures, except where such costs are estimated BTC shall provide the underlying assumptions to support the cost estimate. 100% design plans will be stamped by the engineer who prepared the plans, and will be suitable for bidding the work. The City will provide BTC with feedback regarding the 100% plans within 14 days of receipt.

Once the 100% design plans for the new segments of Pine Street and St. Paul Street are approved by the City, BTC will bid that work in accordance with the requirements of the Development Agreement. The City will review the bids against the budget included as an exhibit to the Development Agreement, as modified by the engineer's estimates provided through the process outlined above. The City may value engineer the work to the reasonable satisfaction of the City and BTC. The parties shall develop a final budget for the new segments of Pine Street and St. Paul Street by April 15, 2019. The final budget shall include

all cost categories listed in the Development Agreement including, without limitation, those listed in Section 3(c)(ii)(B) of the Development Agreement or on Exhibit D thereto.

5. Design and Budget Bank Street and Cherry Street Streetscape and Utility Work.

The City has delivered the 30% conceptual design plans for Bank Street and Cherry Street and will, within two weeks of the date of this letter, deliver an engineer's estimate of the cost of the work to implement the design shown on the plans, which will be in the form of a table that can be updated to reflect changes in units and quantities as the design is refined, together with a schedule of related soft costs incurred to date that includes backup documentation to substantiate its reported expenditures. This engineer's estimate will not include all construction costs, such as borrowing costs, lender related fees, interest on borrowed money and other costs that BTC will incur or has incurred related to the Public Improvements and the Additional Public Improvements. Nothing set forth in this letter agreement shall in any way limit the scope of recoverable costs listed in the Development Agreement including, without limitation, those listed in Section 3(c)(ii)(B) of the Development Agreement or on Exhibit D thereto, or shall limit the obligation set forth in the Development Agreement that the Final Budget (as that term is defined therein) is subject to the parties' mutual agreement.

The City will proceed to complete the designs for Bank Street and Cherry Street, inclusive of the intersections, and shall design grading and materials in the intersections based upon the finished grading and materials specified in the agreed-upon plans and specifications for the new segments of Pine Street and St. Paul Street to be furnished by BTC to the City. The City shall cause its design consultants to coordinate grading and materials at entry points to BTC's project and to 67 Cherry Street (the former Macy's property), using information provided by BTC to the City.

By December 31, 2018, the City will provide BTC with 75% design plans and specifications for Bank Street and Cherry Street for its review, together with an updated engineer's estimate of the cost of the work prepared by updating the table originally provided by the City and an updated schedule of related soft costs incurred to date and all estimated related soft cost expected to be incurred that includes backup documentation to substantiate its reported expenditures except where the cost is estimated in which case the City shall provide the underlying assumptions to support the estimated costs. BTC will provide the City with feedback, if any, regarding the 75% plans within 14 days of receipt.

The City may value engineer the work, provided that the design for those half blocks of Bank Street and Cherry Street immediately adjacent to the Project shall in all events be mutually satisfactory to the parties (the "Priority Blocks", being the north side of Bank Street between Pine Street and St. Paul Street and the south side of Cherry Street between Pine Street and St. Paul Street).

The City will present the completed 75% design plans to the City Council as directed by the Council's May 21, 2018 resolution.

By February 28, 2019, the City will provide BTC with 100% design plans and specifications for Bank Street and Cherry Street for its review, together with an updated engineer's estimate of the cost of the work prepared by updating the table originally provided by the City and an updated schedule of related soft costs incurred to date that includes backup documentation to substantiate its reported expenditures except where the cost are estimated in which case the City shall provide the underlying assumption to support the estimate costs. 100% design plans will be stamped by the engineer who prepared the plans and will be suitable for bidding the work. BTC will provide the City with feedback regarding the 100% plans within 14 days of receipt.

Once the 100% design plans for Bank Street and Cherry Street are approved by the City (including the design of the Priority Blocks which are subject to the parties' mutual approval as stated above), BTC will bid that work in accordance with the requirements of the Development Agreement. The parties agree that in order to ensure that there are sufficient funds to pay for work relating to the Priority Blocks inclusive of intersections, at the City's election either (1) such work shall be bid separately from and prior to the other blocks, or (2) when such work is bid, all other work on Bank Street and Cherry Street included in the bid package shall be bid on an Add Alternate basis. The City will review the bids against the updated engineer's estimate and budget, such estimate and budget shall be pre-approved by the City and BTC. If the bids indicate that the cost of the work as described in the approved 100% design plans will exceed the estimated cost and budget, the City may value engineer the work provided that the design of the Priority Blocks is subject to the parties' mutual approval as stated above. The parties shall develop a final budget for Bank Street and Cherry Street by April 15, 2019.

So long as the timeline established by this letter is substantially met, BTC shall construct those blocks of Bank Street and Cherry Street for which funds are available in the budget (as determined in accordance with the Development Agreement as expressly modified by this letter), in accordance with the requirements and conditions of the Development Agreement.

4. Budgeting and Communication. To effectively manage the costs associated with the Public Improvements and Additional Public Improvements so that they remain within the final estimated costs and budget approved by the City and BTC, it is necessary for the City to maintain an accurate running tally of reimbursable costs incurred by BTC as the Project progresses. BTC agrees to provide the City with complete and accurate information related to the cost of demolishing the existing improvements and designing the new segments of Pine Street and St. Paul Street for which BTC expects reimbursement under the Development Agreement, including bidding materials,

contracts, and other materials reasonably requested by the City, within 14 days of the date of this letter. BTC will also provide information for all hard and soft costs which have been incurred to date and for which BTC expects reimbursement under the Development Agreement. BTC shall update such costs promptly as these costs are incurred or become known, including providing backup materials substantiating such costs as reasonably requested by the City, to facilitate the parties' ability to design the Public Improvements and the Additional Public Improvements so that they can be constructed using available TIP funds.

Building Permits for Project Improvements

5. Permit for Foundation Work

Section 3(b) of the Development Agreement requires, in part, that prior to commencing foundation work for the Project BTC must provide the City with (1) a copy of an executed construction contract that contains a guaranteed maximum price ("GMP") to construct the Public Improvements and (2) evidence that the obligation to construct the Private Improvements is subject to a guaranteed maximum price contract. As outlined above, BTC will not be in a position to execute a construction contract that contains a guaranteed maximum price to construct the Public Improvements until early 2019. In addition, BTC has expressed to the City that it is prepared to enter into a guaranteed maximum price construction contract to construct the foundation for the Project and is ready to proceed with that work, but is not yet prepared to enter into a guaranteed maximum price construction contract to construct the balance of the Private Improvements. The foundation work is defined as excavation of the earth within the project site area where the excavated soil is removed from the site, deep excavation work to construct basement mechanical rooms on the project site, installation of permanent underground utilities (excluding all temporary utilities to be arranged to accommodate the construction of the Project), support of excavation if undertaken to assist with deep excavations, and bearing H-piles, and foundation concrete ("Foundation Work").

BTC shall complete the Foundation Work through means of one or more of the following forms of documentation: (i) a GMP contract with a construction manager to perform the Foundation Work, benefited by payment and performance bonds or another customary and commercially reasonable form of financial surety reasonably satisfactory to the City, such other form of satisfactory surety shall include, among other items, a guaranty (in a form reasonably satisfactory to the City) that the Foundation Work shall be completed by Rouse Properties, LLC or, alternatively, by an unrelated entity either of which entities has a GAAP net worth of at least \$250 million; or (ii) direct GMP contracts with SD Ireland and H.E. Fleming to perform Foundation Work, benefited by payment and performance bonds or another customary and commercially reasonable form of financial surety reasonably satisfactory to the City, such other form of satisfactory surety shall include, among other items, a guaranty (in a form reasonably satisfactory to the City) that the Foundation Work shall be completed by Rouse Properties, LLC or, alternatively, by an unrelated entity either of which entities has a GAAP net worth of at least \$250 million.

The Parties hereto agree that no conditions contained in the Development Agreement remain to be satisfied prior to the City's release of the building permit to authorize the Foundation Work upon execution of this letter agreement other than the City's receipt of the fully executed and delivered contract for the performance of the work (using one of the methods described above).

In consideration of the foregoing and the other mutual promises contained in this letter, the City agrees to release the building permit for the Foundation Work before BTC delivers executed GMP contracts to construct the Public Improvements and the balance of the Private Improvements so long as all of the other conditions of the Development Agreement and zoning permit related to the release of the building permit for the Foundation Work have been satisfied.

6. Permit for Balance of Project.

The Parties hereto further agree that prior to the commencement of the balance of construction of Private Improvements beyond the Foundation Work, BTC shall provide the City with evidence that the obligation to construct the balance of Private Improvements is subject to a guaranteed maximum price contract that is secured by payment and performance bonds for the benefit of the construction lender, a completion guaranty for the benefit of the construction lender, or another customary and commercially reasonable form of financial surety reasonably satisfactory to the City.

7. GMP for Public Improvements.

The Parties hereto further agree that after a final budget to construct the Public Improvements is agreed to by the City and BTC, which this letter agreement requires to occur by April 15, 2019, and prior to the commencement of construction of Public Improvements, BTC shall provide the City with a copy of an executed construction contract that contains a guaranteed maximum price to construct the Public Improvements, consistent with the agreed upon final budget, and in accordance with the Development Agreement as expressly modified by this letter.

Signature Page to Follow

BTC Mail Associates LLC
August 28, 2018
Page 3

So that this letter serves as an agreement of the parties with respect to the subject matter covered, please have BTC countersign a copy of this letter to evidence its agreement to be bound by its terms.

Very truly yours,

City of Burlington

By:


Mike Weinberg, Mayor

Enclosure.

cc: Brian Dunkle, Esq. (via email only)
Neale Lunderville (via email only)
Richard Haesler, Esq. (via email only)
Jeremy Parlow, Esq. (via email only)

ACCEPTED AND AGREED:

BTC Mail Associates LLC


By: RB Burlington Associates, LLC, its sole Member

By: RSE Burlington, LLC, its Managing Member

By:

Name:

Title:



By: BDM Associates, LLC, a Member

By:

Name: Donald Sinex

Title: Manager

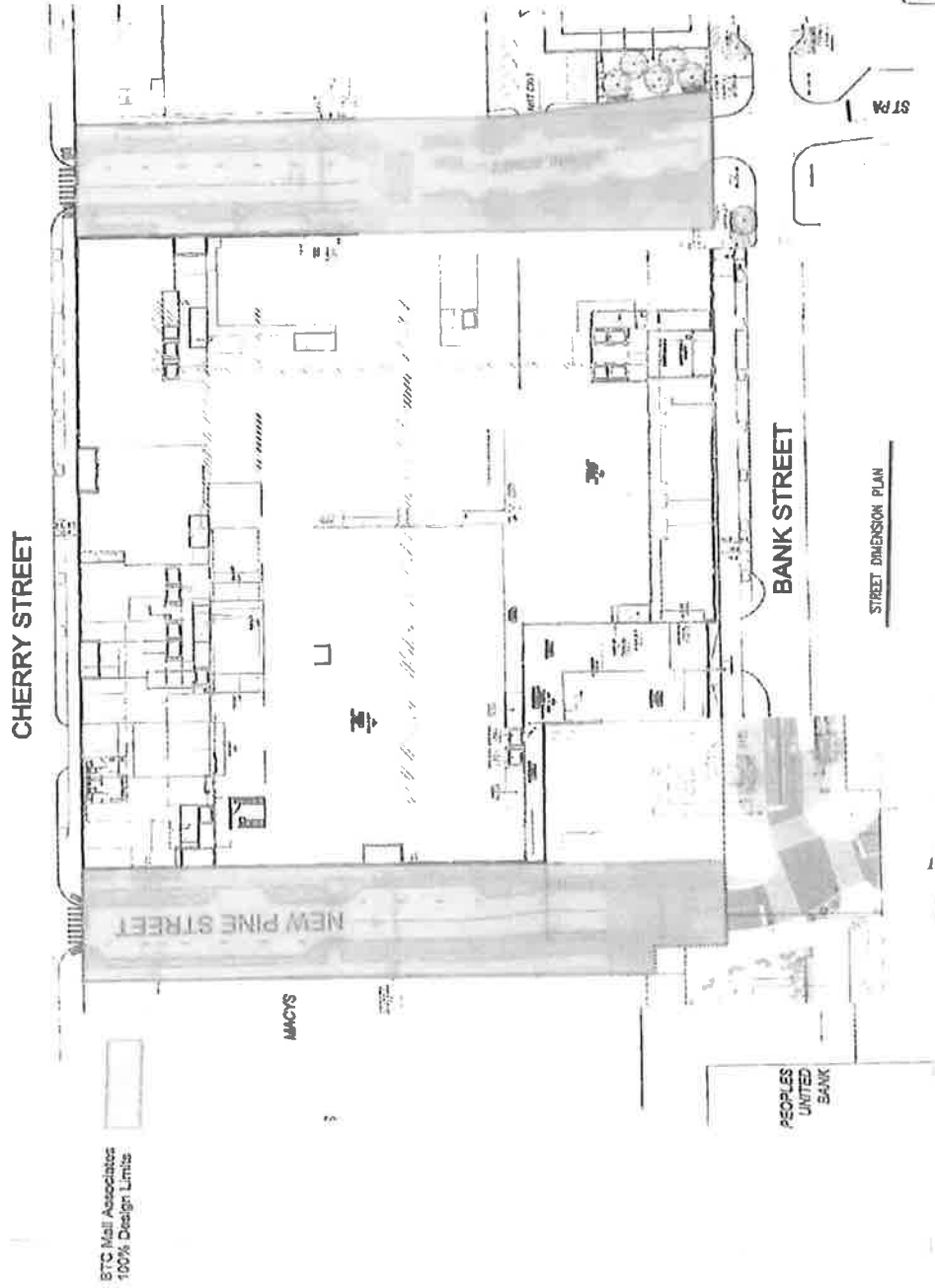
BTC Mail Associates LLC
August 28, 2018
Page 9

Exhibit A
Limits of BTC Street Design Responsibility

Attached

Sketch A
Limits of Etc Street Design Responsibility

10



Logos and project information including:
- **BURLINGTON CITY PLACE**
- **STREET DIMENSION PLAN**
- **DATE FOR CONSTRUCTION: 9/25/17**
- Logos for **ITF**, **WARDY**, and **Muller/PCS**

BTC Mall Associates, LLC
c/o Donald F. Sinex, Manager
3730 N Ocean Drive, 6-B
West Palm Beach Florida 33404

VIA EMAIL FAX AND FEDERAL EXPRESS

September 3, 2020

City of Burlington
City Hall
149 Church St.
Burlington, VT 05401
ATTN: Mayor Miro Weinberger

Re: Termination of Development Agreement, City of Burlington and BTC Mall Associates, LLC

Dear Mayor Weinberger:

The Development Agreement dated October 26, 2017 between the City of Burlington and BTC Mall Associates, LLC (“Development Agreement”) has been mutually abandoned and terminated by the parties by virtue of the impossibility of performance, the parties’ mutual abandonment of the project described therein and acknowledgment that it would not be constructed, their mutual inaction and waivers of performance by the other. In addition, BTC Mall Associates, LLC has today formally abandoned, withdrawn, and relinquished the DRB Approval as that term is defined in the Development Agreement, Background ¶D. *See Attached Correspondence to Burlington Development Review Board.*

As the City’s attorney, Jeremy Farkas, acknowledged in his letter to Anan Olsen on July 18, 2020, BTC has not “commence[d] construction of the Project.” *See Notice of Default, July 18, 2020.* Accordingly, pursuant to ¶19 the Development Agreement, that same agreement is now terminated. This Notice of Termination is in addition to, and does not supplant, limit or in any way negate the earlier termination and abandonment of the Development Agreement that has previously occurred through the parties’ conduct.

I look forward to working with the City to negotiate a new agreement for the construction of a successful development at the project site.

Sincerely,



Donald F. Sinex, Manager
BTC Mall Associates, LLC

CC: City of Burlington, City Attorney
Marc Heath, Esq.
Jeremy Farkas, Esq.



BTC Mall Associates, LLC
c/o Donald F. Sinex, Manager
3730 N Ocean Drive, 6-B
West Palm Beach, Florida 33404

September 3, 2020

VIA EMAIL FAX FEDERAL EXPRESS

Burlington Development Review Board
645A Pine Street
Burlington, VT 05401

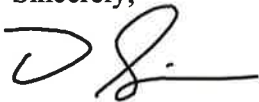
Re: File No. ZP17-0662CA/MA dated March 17, 2017

To Whom It May Concern:

Please be advised that BTC Mall Associates, LLC, Devonwood Investors, LLC and their associated and affiliated entities ("BTC"), hereby abandon, withdraw and relinquish the submission to the Burlington Planning & Zoning Department for the Burlington Town Center project, as approved by the Burlington Development Review Board decision for File No. ZP17-0662CA/MA, dated March 17, 2017, as modified by the Judgment Order dated July 17, 2018 in the matter captioned *Devonwood Investors, LLC 75 Cherry Street*, Docket No 38-4-17 Vtec.

BTC looks forward to submitting a new project for approval in the near future.

Sincerely,



Manager
BTC Mall Associates, LLC

CC: Mayor Miro Weinberger
City Attorney, City of Burlington
Marc Heath, Esq.
Jeremy Farkas, Esq.

