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**DEVELOPMENT AND PERFORMANCE AGREEMENT**

**between the**

**CITY OF OLIVETTE, MISSOURI**

**and**

**OLIVETTE ODC BREP I, L.L.C., or its affiliate or assignee**

**dated as of**

**[\*Date\*], 2023**

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## DEVELOPMENT AND PERFORMANCE AGREEMENT

**THIS DEVELOPMENT AND PERFORMANCE AGREEMENT** (this “*Agreement*”) is made and entered into as of [\*Date\*], 2023, by and between the **CITY OF OLIVETTE, MISSOURI**, a fourth-class city organized and existing under the laws of the State of Missouri (the “*City*”), and **OLIVETTE ODC BREP I, L.L.C.**, a Delaware limited liability company, or its affiliate or assignee (the “*Developer*”).

### RECITALS

A. The City is authorized and empowered pursuant to the provisions of Article VI, Section 27(b) of the Missouri Constitution and Sections 100.010 through 100.200 of the Revised Statutes of Missouri (collectively, the “*Act*”) and the City Charter, to purchase, construct, extend and improve certain projects (as defined in the Act) and to issue industrial development revenue bonds for the purpose of providing funds to pay the costs of such projects and to lease or otherwise dispose of such projects to private persons or corporations for manufacturing, commercial, warehousing, office industry and industrial development purposes upon such terms and conditions as the City deems advisable.

B. The Developer has acquired approximately five acres of land located on Irvington Court and Reyem Court in the City (as legally described on **Exhibit A**, the “*Project Site*”), upon which it proposes to construct a development consisting of approximately 207 residential apartments (the “*Project Improvements*”) and, together with the acquisition of a leasehold interest in the Project Site, the “*Project*”).

C. Pursuant to the Act, the City Council passed Ordinance No. \_\_\_\_\_ on July 27, 2021 (the “*Ordinance*”), which, (a) approved a Plan for an Industrial Development Project and Cost-Benefit Analysis related to the Project (the “*Plan*”) that contemplates the issuance of taxable industrial revenue bonds in connection with the provision of sales tax exemption on materials used in the construction of the Project and (b) approved this Agreement to describe the terms upon which the Project will be developed. Under Attorney General Opinion 180-81, the Missouri Attorney General determined that the construction and rental of multi-family apartments for profit is a commercial enterprise.

D. The City Council hereby determines that the implementation of the Project and the fulfillment generally of this Agreement are in the best interests of the City, and the health, safety, morals and welfare of its residents, and in accord with the public purposes specified in the Plan.

### AGREEMENT

Now, therefore, in consideration of the premises and mutual promises contained herein and other good and valuable consideration, the adequacy and sufficiency of which are hereby acknowledged, the parties hereto agree as follows:

### ARTICLE I

#### DEFINITIONS

**1.1. Definitions.** In addition to the words and terms defined in the Recitals, the following words and terms shall have the following meanings:

“*Approved Site Plan*” means the detailed site plan or site plans approved by the City for the Project Site in conjunction with the M-U Gateway District zoning in accordance with the Municipal Code.

“*City Council*” means the City Council of the City.

“*Bond Counsel*” means Gilmore & Bell, P.C., St. Louis, Missouri, or an attorney at law or a firm of attorneys selected by the City of nationally recognized standing in matters pertaining to obligations issued by states and their political subdivisions.

“*Bond Documents*” means this Agreement and the trust indentures, leases, bond purchase agreements and other documents to be entered into in connection with the issuance of the Bonds.

“*Bonds*” means the City’s Taxable Industrial Revenue Bonds (Olivette ODC BREP I, L.L.C. Project), Series 2023, in the maximum principal amount of \$55,000,000, which may be issued from time to time for various portions of the Project in accordance with the Act, the Ordinance, the Plan and this Agreement.

“*City Attorney*” means Paul Martin, P.C. or any other person or law firm appointed as the City Attorney pursuant to the Municipal Code.

“*City Manager*” means the person duly appointed as City Manager pursuant to the Municipal Code.

“*Concept Site Plan*” means the site development plan set forth on **Exhibit B**, which is hereby incorporated by reference, depicting the conceptual program for construction of the Work.

“*Event of Default*” means any Event of Default as provided in **Section 5.1**.

“*Governmental Approvals*” means all plat approvals, re-zoning or other zoning changes, planned unit development approvals, site plan approvals, conditional use permits, variances, building permits, architectural review or other subdivision, zoning or similar approvals, or approvals required by the Municipal Code, any other applicable law or this Agreement for the completion of the Project and the issuance of the Bonds.

“*Municipal Code*” means the Code of Ordinances of the City of Olivette, Missouri, as may be amended from time to time.

“*Preliminary Funding Agreement*” means the Preliminary Funding Agreement dated as of February 16, 2021, between the City and the Developer, as may be amended from time to time in accordance with its terms.

“*Price Road Access Agreement*” means an agreement or instrument transferring title or granting an easement or other insurable property interest from the City to Developer of a portion of the City’s property located at 1200 N. Price Road sufficient to allow east-west access from the Project Site to Price Road, generally in the location depicted on **Exhibit E** attached hereto. Such agreement shall be contingent on the City first obtaining the Public Access to North Price Road, shall require the Developer to maintain the east-west access to Price Road at no cost to the City, and shall be in a form acceptable to the City Attorney.

“*Public Access to North Price Road*” means a declaration, by final judgment of a court of competent jurisdiction, that North Price Road, from Olive Boulevard to Alice Place, is a public street of the City of Olivette, accessible to and useable by the general public.

“*Related Party*” means (a) any party related to the Developer or **Balboa Real Estate Partners, LLC** or by one of the relationships described in Section 267(b) of the United States Internal Revenue Code of 1986, as amended, (b) any party controlled by or under common control with the Developer or **Balboa Real Estate Partners, LLC** or (c) any affiliated entity (including any joint venture) in which **Balboa Real Estate Partners, LLC** has an ownership interest, directly or indirectly.

“*Total Construction Value*” means the total cost of all construction contracts or subcontracts entered into by the Developer or its general contractor in connection with the Project, excluding the amount of any such contracts attributable to the general contractor’s fee, general conditions, insurance, design fees, soft costs and furniture, fixtures and equipment.

“*State*” means the State of Missouri.

“*Work*” means:

- (a) construction of public improvements on and around the Project Site as follows:
  - (1) storm and sanitary sewers, stormwater control, detention facilities, fencing, sidewalks and other infrastructure improvements required to obtain all necessary approvals and permits,
  - (2) water mains,
  - (3) construction, reconstruction and/or relocation of other utilities; and
- (b) construction of the Project Improvements, including one or more buildings containing approximately 207 apartment units, as set forth on the Approved Site Plan.

## ARTICLE II

### PROJECT COSTS

#### 2.1. Project Costs.

(a) *Preliminary Costs.* The City and the Developer hereby acknowledge that, pursuant to the Preliminary Funding Agreement, the Developer is responsible for funding certain costs incurred by the City in connection with the preparation of the Plan and the negotiation and preparation of this Agreement (including, without limitation, attorney and consultant fees). To the extent that payment is not already provided by the terms of the Preliminary Funding Agreement, the Developer shall pay, upon receipt of an invoice from the City and supporting documentation consistent with the requirements of the Section 2 of the Preliminary Funding Agreement, any costs incurred by the City related to the negotiation, preparation or review of any document related to the development, financing or refinancing of any portion of the Project (including, without limitation, Bond Documents, estoppels, consents and attornment agreements).

(b) *Issuance Costs.* The Developer shall pay, prior to or simultaneously with the issuance of the Bonds or a series thereof, all costs of issuance related to the Bonds or the applicable series, including, without limitation, City Attorney fees, Bond Counsel fees, and trustee fees, not to exceed [\*\$50,000\*]. Notwithstanding the foregoing, the limitation in the prior sentence shall not restrict any payments due under (a) above regarding City Attorney, Bond Counsel or trustee fees not directly related to the initial issuance

of the Bonds, including, without, limitation, amendments to Bond Documents or estoppels or similar documents associated with refinancing the Project.

(c) *Construction Costs.* The Developer shall be solely responsible for funding or obtaining financing to fund all costs of acquiring and constructing the Project.

(d) *Off-Site Improvement Costs.*

(1) The Developer shall pay to the City, simultaneously with the issuance of the Bonds, the sum of \$80,000, which funds shall be used by the City to construct a public sidewalk along Alice Place from the Project Site's western property line westward to Price Road. The City shall be solely responsible for any costs of constructing the sidewalk in excess of \$80,000. Simultaneously with the execution of this Agreement, the Developer shall provide the City with copies of all engineering, plans and specifications previously procured by the Developer for the proposed sidewalk.

(2) The Developer shall be responsible for installing and paying all costs of installing a public sidewalk along Alice Place from the Project Site's western property line eastward to Hilltop Avenue. The parties acknowledge that there are private improvements, including fencing, in the City's right-of-way where the sidewalk will be located. Prior to the Developer commencing any sidewalk work within the right-of-way, the City will communicate with adjacent property owners to notify them that any private improvements, including fencing, encroaching on the City's right-of-way where the sidewalk will be constructed will be removed by the City or the Developer. The City will further communicate to the Developer and arrange for any related approvals or consents from any such adjacent property owners if any private improvements are to be relocated from the City's right-of-way to the adjacent property owner's property. If the City is not able to obtain written agreement from an adjacent property owner to remove such private improvements from the right-of-way, then upon Developer's request, the City will promptly remove such private improvements, and the Developer shall reimburse the City for the reasonable cost of such removal work within thirty (30) days after the Developer's receipt of an invoice from the City in reasonable detail.

(3) Simultaneously with the issuance of the Bonds, the Developer shall pay the City the sum of \$170,000, which the City will use to fund improvements to the northern half of the intersection of Price Road and Olive Boulevard (the design and timing of such improvements to be within the sole discretion of the City, subject to any applicable review by other governmental agencies).

(e) *No Waivers.* Nothing in this Agreement shall be construed to waive any application fee or other cost to the Developer associated with any Governmental Approval required by the Municipal Code, including but not limited to application fees for zoning changes and building permits.

### ARTICLE III

#### OWNERSHIP OF THE PROJECT SITE; SCHEDULE; CONSTRUCTION OF THE PROJECT; CITY APPROVALS

**3.1. Ownership of the Project Site.** The Developer represents that either it and/or a Related Party has acquired all of the real property included in the Project Site and required for construction of the

Project, except for the property interests contemplated in the Price Road Access Agreement and the Public Access to North Price Road.

### **3.2. Project Construction.**

(a) The Developer will substantially complete the Project Improvements by July 1, 2026, subject to **Section 3.8**. Substantial completion shall be determined by the City's acceptance or deemed acceptance of the Certificate of Substantial Completion pursuant to **Section 3.7**.

(b) Upon reasonable advance notice from the City, the Developer and its project team shall meet with the Mayor, the City Manager and such other City staff and consultants as designated by the Mayor or the City Manager to review and discuss the design and construction of the Work to enable the City to monitor the status of construction and the aesthetics of the Work and to determine that the Work is being performed and completed in accordance with this Agreement and the Municipal Code.

(c) Construction of the Work shall be pursued in a good and workmanlike manner in accordance with the terms of this Agreement.

**3.3. Construction Contracts; Insurance.** All construction contracts for the Work entered into by or on behalf of the Developer shall state that the contractor has no recourse against the City in connection with the contractor's construction of the applicable portion of the Work. The Developer shall obtain or shall require any contractor to obtain workers' compensation, commercial public liability and builder's risk insurance coverage in the amounts required by the Bond Documents and shall deliver evidence of such insurance to the City in accordance with the provisions of the Bonds Documents. The Developer shall require that such insurance be maintained by the contractors for the duration of the construction of the applicable portion of the Work.

### **3.4. Competitive Bids; Prevailing Wage; Federal Work Authorization; Minority and Women Business Enterprise Contracting Goals.**

(a) The Developer shall comply with all federal, State and local laws relating to the construction of the Project, including, but not limited to, Section 107.170 of the Revised Statutes of Missouri and laws relating to the payment of prevailing wages and competitive bidding, to the extent such laws are applicable to the Project or portions thereof.

(b) The Developer will comply with and satisfy the requirements of Section 285.530.2 of the Revised Statutes of Missouri, which requires (1) any business entity receiving tax abatement to, by sworn affidavit and provision of documentation, annually affirm its enrollment and participation in a federal work authorization program with respect to the employees working in connection with the business entity receiving tax abatement, and (2) every such business entity to annually sign an affidavit affirming that it does not knowingly employ any person who is an unauthorized alien in connection with the entity receiving tax abatement. The Developer shall provide such affidavit, in substantially the form attached as **Exhibit C**, and documentation to the City Manager or his designee on or before November 15 of each year during the term of this Agreement, beginning November 15, 2023.

(c) The Developer and the Developer's general contractor shall use good faith efforts to spend no less than fifteen percent (15%) of the Total Construction Value with minority and women owned subcontractors and suppliers (the "Contracting Goals"). The Developer and the Developer's general contractor shall provide a written report to the City each calendar quarter documenting past (commencing with the Effective Date), pending, and anticipated expenditures, and analyzing progress toward the Contracting Goals, including identification of any specialized areas of construction in which less than three



minority or woman-owned businesses in the St. Louis metropolitan area were identified as potential subcontractors for such specialized construction.

**3.5. Governmental Approvals.** The Developer shall obtain or cause to be obtained all necessary Governmental Approvals and shall be subject to all lawful inspections and perform such necessary acts as are required under the ordinances of the City. The City agrees to cooperate with the Developer and to process and timely consider all complete applications for the Governmental Approvals as received, all in accordance with the Municipal Code and laws of the State; provided, however, that nothing herein contained shall be construed as the City's current approval of, or acquiescence to, any Governmental Approvals, the parties acknowledging that such matters can only be approved by the City in the proper exercise of its municipal functions through appropriate governmental procedures.

**3.6. Concept Site Plan; Approved Site Plan; Zoning.**

(a) *Approval of Concept Site Plan and Approved Site Plan.* The City hereby approves the Concept Site Plan and will not unreasonably withhold or delay approval of the Approved Site Plan. Such approval does not exempt the Developer from any site plan review process required by the Municipal Code. The parties agree that the Approved Site Plan shall govern the ultimate design and construction of the Project.

(b) *Changes.* The Developer may make changes from time to time to the Approved Site Plan as permitted by the Municipal Code.

(c) *Planned Zoning.* The Developer agrees that the Project will be developed pursuant to the M-U Gateway District zoning designation, as modified by Ordinance No. \_\_\_\_\_ passed by the City Council on \_\_\_\_\_, 2021 and any other amending ordinance of the City subsequently adopted, and will timely file all applicable site plan approval requests. The Developer acknowledges that the City may impose certain quality standards for the Project as part of such zoning.

**3.7. Certificate of Substantial Completion.**

(a) The Developer shall furnish a Certificate of Substantial Completion, in substantially the form of **Exhibit D**, which is hereby incorporated by reference, to the City.

(b) The appropriate City official shall diligently process the submitted Certificate of Substantial Completion, including making such inspections as may be reasonably necessary to verify the accuracy of the project architect's certifications accompanying the Certificate of Substantial Completion. The appropriate City official shall accept or reject the Certificate of Substantial Completion in writing within 45 days following delivery to the City. If the City fails to approve or reject the Certificate of Substantial Completion in writing within such 45-day period, then the Developer shall notify the City in writing of the City's failure to take action on the Certificate of Substantial Completion and the City shall have 45 days from receipt of such notice to accept or reject the Certificate of Substantial Completion in writing. If the City has not accepted or rejected the Certificate of Substantial Completion within such 45-day period, the Certificate of Substantial Completion shall be deemed accepted by the City as of the expiration of such 45-day period. If the appropriate City official rejects the Certificate of Substantial Completion, such rejection shall specify in reasonable detail in what respects the Developer has failed to complete the Work in reasonable accordance with the provisions of this Agreement, or in what respects the Developer is otherwise in default, and what measures or acts the Developer must take or perform, in the good faith opinion of such City official, to obtain such acceptance.

(c) The City may issue any and all appropriate certificates of occupancy in accordance with the Municipal Code, even if the City has not yet accepted the Certificate of Substantial Completion.

**3.8 Excusable Delay.** Notwithstanding anything to the contrary contained herein or in the Plan, the schedule for completion of the Project Improvements described in **Section 3.2** and any other obligations herein shall be automatically extended by the number of days of delay caused by actions or events beyond the control of the Developer, including, without limitation, damage or destruction by fire or casualty, strike, lockout, civil disorder, war, restrictive government regulations, lack of issuance of any permits and/or legal authorization by the governmental entity necessary for the construction and occupation of the Project (provided that reasonable efforts have been made to obtain said permits/authorizations and all conditions precedent to the issuance of said permits and/or authorizations have been met), shortage or delay in shipment of material or fuel, acts of God, pandemic, unusually adverse weather or wet soil conditions, or other like causes beyond the Developer's reasonable control, including without limitation any litigation, court order or judgment resulting from any litigation affecting the validity of this Agreement or the Bond Documents (collectively, an "Excusable Delay"). The parties agree that as of the date of this Agreement, no known condition or event exists that would justify an Excusable Delay. Notwithstanding the foregoing, no Excusable Delay will be deemed to exist unless the Developer notifies the City in writing of such Excusable Delay within 30 days after the commencement of the event causing such Excusable Delay (or within 30 days after the date that the Developer should reasonably have determined that such event will cause such Excusable Delay). An Excusable Delay shall not include any condition or circumstance caused or extended by the Developer or a Related Party or attributable to the action or inaction of the Developer or a Related Party, with the exception of any excusable delay under a construction contract with a Related Party. If unforeseen site conditions on the Project Site, such as unknown environmental contamination or geotechnical conditions not identified prior to the inception of the Project, cause significant delay in preparing the Project Site for construction of the Project Improvements, the deadlines provided in **Section 3.2** shall be extended for that period of time which the Developer can demonstrate to the reasonable satisfaction of the City Council to be necessary to remediate such conditions, but in no event shall the date for substantial completion in **Section 3.2** be extended beyond December 31, 2027.

**3.9. Sales and Use Tax Exemption.** The City will issue the Bonds and the City and the Developer will enter into the Bonds Documents to facilitate a sales and use tax exemption on qualified building materials used to construct the Project Improvements. Simultaneously with the closing of the Bonds, the City will provide a project exemption certificate to the Developer.

## ARTICLE IV

### PRICE ROAD ACCESS AGREEMENT

#### **4.1. Price Road Access Agreement.**

(a) The Developer will use commercially reasonable, good faith efforts to acquire an easement from the owner of Lot 1 of the Beckman Brothers Record Plat, recorded with the St. Louis County Recorder of Deeds in Plat Book 357, Page 63, necessary to provide for an east-west access road from the Project Site to Price Road (the "*CVS Easement*").

(b) If the Developer is unable to obtain the CVS Easement, the City Manager, on behalf of the City, is authorized to execute the Price Road Access Agreement.

(c) The City will use good faith efforts to obtain the Public Access to North Price Road by **December 31, 2022**. If the City is unable to obtain the Public Access to North Price Road by such date, the Developer shall have no obligation to construct an east-west access road from the Project to Price Road (and the City and the Developer agree that the Approved Site Plan may show that the ingress and egress from Price Road is contingent upon obtaining the Public Access to the North Price Road and the Developer shall not be required to submit any revisions to the Approved Site Plan in order to show the removal of such ingress and egress from Price Road). The parties acknowledge that the initial Approved Site Plan, to the extent it shows an east-west access road to Price Road, may contain a notation indicating that the construction of the access road is contingent upon the City obtaining the Public Access to North Price Road. **[NOTE – did City already complete? If so, can revise to say “City obtained...”]**

## ARTICLE V

### GENERAL PROVISIONS

**5.1. Events of Default.** If any one or more of the following events occurs and is continuing, it is hereby defined as and declared to be and to constitute an Event of Default hereunder:

(a) either party fails to perform any of its material obligations hereunder for a period of 30 days (or such longer period as the City and the Developer may agree in writing) following written notice to the defaulting party of such failure, or if such failure is not subject to cure within such 30 days after such notice, the defaulting party fails to initiate action to cure the default within such 30 days after such notice is given and fails to pursue such action diligently; or

(b) any representation of either party contained herein proves to be materially false or erroneous and is not corrected or brought into compliance within 30 days (or such longer period as the City and the Developer may agree in writing) following written notice to the defaulting party specifying the false or erroneous representation and requiring it to be remedied, or if such matter is not subject to cure within such 30 days after such notice, the defaulting party fails to initiate action to cure the default within such 30 days after such notice is given and fails to pursue such action diligently.

**5.2. Remedies on Default.** As provided in the Bond Documents, any Event of Default referred to in **Section 5.1** shall also constitute an Event of Default under the Bond Documents, affording the City the remedies specified therein, to the extent permitted by State law.

**5.3. Remedies.** Upon the occurrence of an Event of Default, the aggrieved party may institute such proceedings as may be necessary or desirable in its opinion to cure and remedy such default, including, but not limited to proceedings to compel specific performance by the defaulting party or to terminate this Agreement.

## ARTICLE VI

### GENERAL PROVISIONS

**6.1. Term of Agreement.** This Agreement shall become effective upon execution by the parties hereto and shall terminate upon the earliest to occur of the following:

(a) the payment in full of the Bonds (or any bonds issued to refund the Bonds) and the payment of all amounts due under this Agreement;

(b) the occurrence and continuance of an Event of Default beyond the cure period and the subsequent termination of this Agreement pursuant to the provisions of this Agreement; or

(c) the expiration of the leasehold interests set forth in the Bond Documents (including, without limitation, termination as a result of the Developer's purchase of the Project by tendering the Bonds for cancellation pursuant to **Article XI** of the Lease Agreement included in the Bond Documents).

**6.2. Successors and Assigns.**

(a) The Developer shall not assign its interest in this Agreement prior to the City's acceptance or deemed acceptance of the Certificate of Substantial Completion without the consent of the City Council unless such assignment is to a Related Party or made as part of a collateral assignment in connection with the financing or refinancing of the Project. Notwithstanding the foregoing, the City Council shall not withhold its consent if it is reasonably satisfied that the proposed assignee has significant experience developing mixed-use projects and the financial ability to complete the Project or engages Developer, **Balboa Real Estate Partners, LLC**, or any affiliate of either of them to complete the same.

(b) The Developer shall, immediately upon the consummation of any assignment of its interests in this Agreement, provide the City with a copy of the assignment and assumption agreement between the Developer and the assignee.

**6.3. Notices.** All notices, certificates or other communications required or desired to be given hereunder shall be in writing and shall be deemed duly given when mailed by registered or certified mail, postage prepaid, delivered personally, or sent by overnight delivery or other delivery service which requires written acknowledgment of receipt by the addressee, addressed as follows:

(a) If to the City:

City of Olivette, Missouri  
1140 Dielman Road  
Olivette, Missouri 63132  
Attn: City Manager

with copies to:

Paul Martin, P.C.  
1406 N. Broadway  
St. Louis, Missouri 63102

and:

Gilmore & Bell, P.C.  
211 North Broadway, Suite 2000  
St. Louis, Missouri 63102  
Attn: Shannon Creighton, Esq. and Mark A. Spykerman, Esq.

(b) If to the Developer:

Olivette ODC BREP I, L.L.C.  
c/o \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

with copies to:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
Attn: \_\_\_\_\_

and:

Polsinelli PC  
630 Bolivar Street, Suite 201  
Jefferson City, Missouri 65101  
Attn: Ben Musholt, Esq.

The City and the Developer may from time to time designate, by notice given hereunder to the other party, such other address to which subsequent notices, certificates or other communications shall be sent. Attorneys for a party may give notice on behalf of their client.

**6.4. Contractual Liability Insurance Requirements.** The Developer shall maintain contractual liability insurance covering the Developer's indemnification obligations under **Section 6.5**. The contractual liability insurance shall be placed with insurance company or companies authorized to do business in the State of Missouri or generally recognized international insurers or reinsurers with an A.M. Best rating of not less than "A-" or the equivalent thereof as may be selected by the Developer, provided, the City Attorney must be reasonably satisfied this this Agreement is an "insured contract" (or equivalent terminology) under the policy or policies obtained by the Developer. The Developer shall provide the City with copies of such insurance policy and a current certificate of insurance to evidence the current effectiveness of such insurance coverage upon the execution of this Agreement and from time to time thereafter upon written request of the City. If requested by the City Attorney, the Developer shall cause the City to be named as an additional insured under the contractual liability insurance coverage required by this subsection.

**6.5. Release and Indemnification.**

(a) The indemnification and covenants contained in this Section shall survive expiration or earlier termination of this Agreement.

(b) The Developer hereby agrees that, anything to the contrary herein notwithstanding, it will defend, indemnify and hold harmless the City, its governing body members, employees, attorneys and agents against any and all claims, demands, actions, causes of action, loss, damage, injury, liability and/or expense (including reasonable attorneys' fees and court costs) from third party claims resulting from, arising out of, or in any way connected with (1) the Developer's breach (beyond any applicable notice and opportunity to cure) of this Agreement or the Bond Documents, (2) the negligence or intentional misconduct of the Developer or an affiliate thereof or its respective employees and agents, (3) the presence of hazardous

wastes, hazardous materials or other environmental contaminants on the Project Site, except to the extent the same are released or introduced by the City, (4) any loss or damage to property or any injury to or death of any person occurring in or about the Project Site in connection with any activities, acts or omissions of the Developer or a Related Party or any of its respective contractors, agents or employees, or (5) otherwise arising out of the adoption or administration of this Agreement, the Bond Documents or the construction of the Project. In the event that the validity or construction of the Act and/or any other ordinance of the City adopted in connection with this Agreement or the Bond Documents or affecting the Project are contested in court, the City shall be defended, held harmless and indemnified by the Developer from and against all claims, demands and/or liabilities of any kind whatsoever including, without limitation, any claim for reasonable attorneys' fees and court costs, and the Developer shall pay any monetary judgment and all court costs rendered against the City, if any.

(c) Notwithstanding anything herein to the contrary, the City, its governing body, employees, attorneys and agents shall not be liable to the Developer for damages or otherwise in the event that all or any part of the Act and/or any other ordinance of the City adopted in connection with this Agreement, the Bond Documents or the Project is declared invalid or unconstitutional in whole or in part by the final (as to which all rights of appeal have expired or have been exhausted) judgment of any court of competent jurisdiction.

(d) Notwithstanding the foregoing terms of this Section, the Developer shall have no obligation to defend, hold harmless or indemnify the City with respect to any matter or expense resulting from or arising out of the negligence or willful misconduct of the City.

(e) All covenants, stipulations, promises, agreements and obligations of the City contained herein shall be deemed to be the covenants, stipulations, promises, agreements and obligations of the City and not of any of the City's governing body members, employees, attorneys or agents in their individual capacities.

**6.6. Choice of Law.** This Agreement shall be taken and deemed to have been fully executed, made by the parties in, and governed by the laws of State for all purposes and intents. Any action arising out of, or concerning, this Agreement shall be brought only in the Circuit Court of St. Louis County, Missouri. All parties to this Agreement consent to the jurisdiction and venue of such court.

**6.7. Counterparts.** This Agreement is executed in multiple counterparts, each of which shall constitute one and the same instrument.

**6.8. Severability.** If any term or provision of this Agreement is held to be unenforceable by a court of competent jurisdiction, the remainder shall continue in full force and effect, to the extent the remainder can be given effect without the invalid provision.

**6.9. No Waiver of Sovereign Immunity.** Nothing in this Agreement shall be construed or deemed to constitute a waiver of the City's sovereign immunity.

**6.10. No Third Party Beneficiaries.** This Agreement constitutes a contract solely between the City and the Developer. No third party has any beneficial interest in or derived from this Agreement.

**6.11. City Consent.** Pursuant to the Ordinance, the Mayor and the City Manager are authorized to execute all documents on behalf of the City (including, without limitation, the Price Road Access Agreement and documents relating to the financing or refinancing of the Project by the Developer) as may be required to carry out and comply with the intent of this Agreement and the Bond Documents. The Mayor and the City Manager are also authorized, unless expressly prohibited herein, to grant on behalf of the City

such consents, estoppels and waivers relating to this Agreement, the Bonds, and the Bond Documents as may be requested during the term hereof; provided, such consents, estoppels and/or waivers shall not increase the principal amount of the Bonds, increase the term of any leasehold interests set forth in the Bond Documents, alter the sales and use tax exemption described in **Section 3.9**, or waive an Event of Default or materially change the nature of the transactions contemplated by this Agreement and the Bond Documents unless otherwise approved by the City Council.

## ARTICLE VII

### REPRESENTATIONS, WARRANTIES AND COVENANTS OF THE PARTIES

**7.1. Representations of the City.** The City makes the following representations and warranties to the Developer, which are true and correct on the date hereof:

(a) *No Violations.* The execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, and the fulfillment of the terms and conditions hereof do not and will not conflict with or result in a breach of any of the terms or conditions of any agreement or instrument to which it is now a party, and do not and will not constitute a default under any of the foregoing.

(b) *No Litigation.* To the City's knowledge, no litigation, proceedings or investigations are pending or threatened against the City with respect to the Project or this Agreement. In addition, no litigation, proceedings or investigations are pending or, to the knowledge of the City, threatened against the City seeking to restrain, enjoin or in any way limit the approval or issuance and delivery of the Bonds or this Agreement or which would in any manner challenge or adversely affect the existence or powers of the City to enter into and carry out the transactions described in or contemplated by the execution, delivery, validity or performance by the City of, the terms and provisions of this Agreement.

(c) *No Default.* No default or Event of Default has occurred and is continuing, and no event has occurred and is continuing which with the lapse of time or the giving of notice, or both, would constitute a default or an Event of Default in any material respect on the part of the City under this Agreement.

(d) *Compliance with Laws.* The City has, to date, complied with the procedural and other requirements concerning the Governmental Approvals granted in connection with the development of the Project, the approval of this Agreement and the issuance of the Bonds.

**7.2. Representations of the Developer.** The Developer makes the following representations and warranties to the City, which representations and warranties are true and correct on the date hereof:

(a) *No Violations.* The execution and delivery of this Agreement, the consummation of the transactions contemplated hereby, and the fulfillment of the terms and conditions hereof do not and will not conflict with or result in a breach of any of the terms or conditions of any corporate or organizational restriction or of any agreement or instrument to which it is now a party, and do not constitute a default under any of the foregoing.

(b) *No Litigation.* To the Developer's knowledge, no litigation, proceedings or investigations are pending or threatened against the Developer with respect to the Project or this Agreement. In addition, to the Developer's knowledge, no litigation, proceedings or investigations

are pending or threatened against the Developer seeking to restrain, enjoin or in any way limit the approval or execution and delivery of this Agreement or which would in any manner challenge or adversely affect the existence or powers of the Developer to enter into and carry out the transactions described in or contemplated by the execution, delivery, validity or performance by the Developer of, the terms and provisions of this Agreement.

(c) *No Default.* No default or Event of Default has occurred and is continuing, and no event has occurred and is continuing which with the lapse of time or the giving of notice, or both, would constitute a default or an Event of Default in any material respect on the part of the Developer under this Agreement, or any other material agreement or material instrument related to the Developer's ability to perform pursuant to this Agreement to which the Developer is a party or by which the Developer is bound.

(d) *Compliance with Laws.* With respect to its ability to perform pursuant to this Agreement, the Developer is, to its knowledge, in material compliance with all valid laws, ordinances, orders, decrees, decisions, rules, regulations and requirements of every duly constituted governmental authority, commission and court applicable to any of its affairs, business and operations as contemplated by this Agreement.

(e) *Accuracy of Project Data.* The Developer has provided certain financial and other information regarding the Project (the "Project Data") to the City. The parties agree that project costs, estimated tax revenues and other financial information included within the Project Data may change as the Project evolves from concept to completion, and such changes may be material. Nevertheless, the Developer represents that (1) the most recently supplied Project Data was, to the Developer's knowledge, developed and provided in good faith and (2) to the Developer's knowledge, the Concept Site Plan set forth on **Exhibit B** is a good faith representation of the uses that the Developer will endeavor to locate on the Project Site, assuming the Public Access to North Price Road is obtained.

(f) *Anti-Discrimination Against Israel Act.* Pursuant to Section 34.600 of the Revised Statutes of Missouri, the Developer certifies it is not currently engaged in and shall not, for the duration of this Agreement, engage in a boycott of goods or services from (1) the State of Israel, (2) companies doing business in or with the State of Israel or authorized by, licensed by or organized under the laws of the State of Israel or (3) persons or entities doing business in the State of Israel.

[Remainder of Page Intentionally Left Blank]



**IN WITNESS WHEREOF**, the City and the Developer have caused this Agreement to be executed in their respective names and the City has caused its seal to be affixed hereto and attested, as of the date first above written.

**CITY OF OLIVETTE, MISSOURI**

(SEAL)

Attest:

By: \_\_\_\_\_  
Barbara Sondag, City Manager

\_\_\_\_\_  
Denise M. Mandel, City Clerk

**OLIVETTE ODC BREP I, L.L.C.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

**EXHIBIT A**

**LEGAL DESCRIPTION OF PROJECT SITE**

The land situated in the County of St. Louis, State of Missouri, and described as follows:

**EXHIBIT B**  
**CONCEPT SITE PLAN**

**EXHIBIT C**

**DEVELOPER'S AFFIDAVIT**

STATE OF MISSOURI                    )  
                                                  ) SS  
COUNTY OF ST. LOUIS                )

I, the undersigned, am over the age of 18 years and have personal knowledge of the matters stated herein.

I am a duly authorized officer of Olivette ODC BREP I, L.L.C., a Delaware limited liability company (the "*Developer*"), and am authorized by the Developer to attest to the matters set forth herein.

I hereby affirm the Developer's enrollment and participation in a "federal work authorization program" as defined in Section 285.525 of the Revised Statutes of Missouri.

The Developer does not knowingly employ any person who is an "unauthorized alien" as defined in Section 285.525 of the Revised Statutes of Missouri.

Further Affiant Sayeth Not.

**OLIVETTE ODC BREP I, L.L.C.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
Notary Public

My commission expires on: \_\_\_\_\_

**EXHIBIT D**

**CERTIFICATE OF SUBSTANTIAL COMPLETION**

**Olivette ODC BREP I, L.L.C.**, or its affiliate or assignee (the “Developer”), pursuant to that certain Development and Performance Agreement dated as of [\*Date\*], 2023, between the City of Olivette, Missouri (the “City”), and the Developer (the “Agreement”), hereby certifies to the City as follows:

1. Capitalized terms used herein and not otherwise defined herein shall have the meanings set forth in the Agreement.

2. That as of \_\_\_\_\_, 20\_\_\_, the Work has been substantially completed in accordance with the Agreement and all applicable Governmental Approvals.

3. The Completed Project Improvements have been completed in a workmanlike manner and in accordance with (a) the plans and permits approved by the City and (b) the applicable zoning and other ordinances that govern the construction of the Project.

4. Lien waivers for the Completed Project Improvements have been obtained.

5. This Certificate of Substantial Completion is accompanied by the project architect’s certificate of substantial completion on AIA Form G-704 (or the substantial equivalent thereof), a copy of which is attached hereto as **Appendix A** and by this reference incorporated herein), certifying that the Completed Project Improvements have been substantially completed in accordance with the Agreement and the Bond Documents.

6. This Certificate of Substantial Completion is being issued by the Developer to the City in accordance with the Agreement to evidence the satisfaction of all obligations and covenants of the Developer under the Agreement and the Bond Documents with respect to the construction of the Completed Project Improvements.

7. The City’s acceptance (below) in writing to this Certificate of Substantial Completion shall evidence the satisfaction of all obligations and covenants of the Developer under the Agreement and the Bond Documents with respect to the construction of the Completed Project Improvements.

This Certificate of Substantial Completion is given without prejudice to any rights against third parties which exist as of the date hereof or which may subsequently come into being. All certifications or statements made or set forth in this Certificate of Substantial Completion are made solely for the benefit of the City and shall not be relied upon or used for any purpose by any third party in any proceeding, claim or contest of any kind, nature or character.

**IN WITNESS WHEREOF**, the undersigned has hereunto set his/her hand this \_\_\_\_ day of \_\_\_\_\_, 20\_\_.

**OLIVETTE ODC BREP I, L.L.C.**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

ACCEPTED:

**CITY OF OLIVETTE, MISSOURI**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

(Insert Notary Form(s) and Legal Description)

**EXHIBIT E**

**PRICE ROAD ACCESS AGREEMENT**

The Price Road Access Agreement shall allow for the construction of an access road in the general vicinity depicted below:

[Attach map showing general location of needed easement]