

Date..... November 23, 2009

RESOLUTION APPROVING MEMORANDUM OF AGREEMENT WITH THE  
STATE HISTORIC PRESERVATION OFFICER FOR ARCHAEOLOGICAL SURVEY  
OF THE SITE OF THE METRO LOFTS PROJECT

WHEREAS, on October 27, 2008, by Roll Call No. 08-650 the City Council approved a resolution expressing its support and a commitment of TIF funds for an application to the Iowa Housing Finance Authority by SA Metro Lofts Limited Partnership requesting Low Income Housing Tax Credits for new construction of a mixed income housing project at 255 Vine Street to be known as Metro Lofts; and,

WHEREAS, the Metro Lofts project is being financed in part with a loan guaranteed by the Department of Housing and Urban Development ("HUD"); and,

WHEREAS, the project is situated within the known boundaries of site designated as 13PK61 and contains components relating to pre-contact American Indian occupation, Fort Des Moines 2, and the early development of the City of Des Moines, and has been determined eligible for listing on the National Register; and,

WHEREAS, the City and the Iowa State Historic Preservation Officer ("SHPO") have determined that the project may have an adverse effect on archaeological resources determined eligible for the National Register of Historic Places;

WHEREAS, to obtain the HUD guarantee, it is necessary for the City to enter into a Memorandum of Agreement with the SHPO and SA Metro Lofts Limited Partnership whereby the City assumes the roles and responsibilities for environmental review, decision making, and actions that would otherwise apply to HUD under the National Environmental Policy Act; and,

WHEREAS, further changes to the proposed Memorandum of Agreement may be required by the SHPO; NOW, THEREFORE,

BE IT RESOLVED, by the City Council of the City of Des Moines, Iowa, as follows:

1. The Memorandum of Agreement between the City, the SHPO and SA Metro Lofts Limited Partnership is hereby approved, subject to such further changes required by the SHPO which have been approved by the City Legal Department as being minor in nature and to not adversely impact the City's interest.

★ **Roll Call Number**

Agenda Item Number

54

Date November 23, 2009

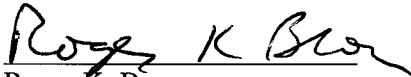
-2-

- The Mayor and City Clerk are hereby authorized and directed to execute the Memorandum of Agreement on behalf of the City, with such further changes approved by the Legal Department as provided above.

( Council Communication No. 09- **832** )

MOVED by \_\_\_\_\_ to adopt.

FORM APPROVED:



Roger K. Brown

Assistant City Attorney

C:\Rog\Eco Dev\Metro Lofts\Environmental\RC Approve MOA.doc

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
COLEMAN				
HENSLEY				
KIERNAN				
MAHAFFEY				
MEYER				
VLASSIS				
TOTAL				

MOTION CARRIED

APPROVED

.....  
Mayor

**CERTIFICATE**

I, DIANE RAUH, City Clerk of said City hereby certify that at a meeting of the City Council of said City of Des Moines, held on the above date, among other proceedings the above was adopted.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal the day and year first above written.

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

**DRAFT**  
**MEMORANDUM OF AGREEMENT**  
**Housing Development**  
**Metro Lofts**  
**2<sup>nd</sup> Avenue and Vine Streets**  
**Des Moines, Iowa**

The State Historic Preservation Officer of Iowa (“SHPO”), the City of Des Moines (“City”), and SA Metro Lofts Limited Partnership (“Developer”), hereby enter into this agreement in consideration for the Developer receiving a loan guarantee from United States Housing and Urban Development (“HUD”); and,

WHEREAS, the Metro Lofts Housing Project (hereafter, Project) will receive a loan guarantee from HUD; and, whereas, the City, pursuant to 24 CFR 58.1, has assumed the roles and responsibilities for environmental review, decision making, and actions that would otherwise apply to HUD under the National Environmental Policy Act (hereafter, NEPA) and other provisions of the law that further the purpose of NEPA, including Sections 101, 106 and 110 of the National Historic Preservation Act (NHPA), as specified in 24 CFR 58.5; and,

WHEREAS, the project will receive a loan guarantee from HUD through the Multi-Family Loan Guarantee Program;

WHEREAS, the project is situated within the known boundaries of site 13PK61 and contains components relating to pre-contact American Indian occupation, Fort Des Moines 2, and the early development of the City of Des Moines, and has been determined eligible for listing on the National Register; and,

WHEREAS, the City has determined that the project may have an adverse effects on archaeological resources determined eligible for the National Register of Historic Places;

WHEREAS, the City has consulted with the State Historic Preservation Officer of Iowa (hereafter, SHPO) pursuant to 36 CFR 800.2(c)(1) and have come to an agreement on the project Area of Potential Effects (hereafter APE) pursuant to 36 CFR 800.4(a)(1); and,

WHEREAS, the Advisory Council on Historic Preservation (hereafter Council) has been notified of the adverse effect finding and has been invited to enter into consultation pursuant to 36 CFR 800.6 (a)(1) but has concluded that its participation in the consultation process will not be necessary to resolve the adverse effects; and,

WHEREAS, the City has sought to identify and invite the consultation of other parties that may have an interest in or specialized knowledge of historic properties that will be adversely affected by the implementation of this undertaking, including the Iowa Tribe of Oklahoma, Iowa Tribe of Kansas and Nebraska, Sac and Fox Nation of Mississippi in Iowa, and the Sac and Fox Nation of Oklahoma but has not received any response; and,

WHEREAS, the City respects the sovereignty of all federally recognized American Indian Tribes in the Section 106 consultation process and recognizes their expertise in identifying and assessing the religious and cultural significance of American Indian historic properties on and off of Tribal lands; and,

WHEREAS, the City, in consultation with the SHPO, proposes to involve the Public by disseminating information about the undertaking and its effects on historic properties in a proper and timely fashion and will seek public participation as mandated by federal law by utilizing HUD procedures for soliciting public involvement found at 24 CFR Part 58.43; --58.45-46; --58.59 and other applicable sections of this part;

NOW, THEREFORE, the City and the SHPO agree that the undertaking shall be implemented in accordance with the following stipulations in order to take into account the effects of the project on significant historic properties.

STIPULATIONS:

The City shall through consultation with the Iowa SHPO, and the other consulting parties listed above ensure that the following measures are executed.

I. ARCHAEOLOGY

1. The City shall ensure that archaeological investigations are conducted under the direct supervision of an archaeologist, who meets or exceeds the Secretary of Interior's professional qualifications for Historical and Prehistoric Archaeology (48 FR 44738-9). The Principal Investigator must demonstrate an ability to comprehend the theoretical approaches, develop research designs, and apply research and field methods that are particular to this discipline and appropriate for this site.
2. Because archaeological deposits relating to the early development of the City of Des Moines, the early 19<sup>th</sup> century military facility known as Ft. Des Moines No. 2 and earlier prehistoric components are mantled by varying depths of urban fill, a four-stage mitigation procedure has been developed. This procedure includes the following tasks: (A) compilation of land-use history; (B) geoarchaeological investigations; (C) data recovery; and, (D) preservation. Completion of the work identified in the proposal from the Office of the State Archaeologist attached hereto as Attachment "A" shall create a presumption of satisfactory completion of Tasks (A) and (B).

A. Land-Use History

1. Prior to field investigations, historic maps and records (e.g. General Land Office (GLO) survey maps and notes, Sanborn Insurance maps, City of Des Moines engineering records, property abstracts, and other historical sources) shall be consulted to determine where, within the APE, previous urban development has reduced the potential for encountering *in situ* archaeological deposits beneath the mantle of urban fill. The results of land-use history studies serve as a guide for the implementation of geoarchaeological field methods and analyses and data recovery efforts.

B. Geoarchaeological Investigations

1. Geoarchaeological investigations shall be consistent with SHPO's *Guidelines for Archaeological Investigations in Iowa* and will be performed by a qualified geomorphologist in cooperation with the project's archaeological principal investigator. Mechanized equipment (i.e., back-hoe fitted with a 4', untoothed landscape bucket, and Geo-probe or Giddings-type auger) will be employed to address the following data sets: (1) areas of high, moderate, and low potential for encountering undisturbed archaeological deposits; (2) depth of fill mantle across the project area and elevations of buried soils (palesols) beneath the fill mantle; (3) delineation of areas that need not be further investigated owing to profound disturbance from former urban development, whose extant structures, structural remnants, or archaeological deposits and features in and of themselves do not qualify for listing on the National Register; and (4) integration of subsurface data with landform characterizations and buried topography with those produced by investigations at the contiguous Martin Luther King, Jr. Parkway, the City of Des Moines' Court Avenue Entertainment Center projects, the Science Center of Iowa, the Vine Street Lofts Housing Project, and the 4<sup>th</sup> and Court Housing Project also located at 13PK61.

### C. Data Recovery

1. A refined data recovery plan (DRP) with research design will be developed utilizing information produced during the Land-Use History and Geoarchaeological studies. A draft of the DRP will be submitted to the SHPO for review and approval prior to the commencement of data recovery. SHPO will have a maximum of thirty (30) calendar days to review the DRP and provide comments. Data recovery efforts will be conducted in accordance with the finalized DRP.
2. Given the urban setting of the project area and the known fill depths, data recovery will be operationalized by mechanized removal of the fill mantle to the interface with the underlying buried A soil horizon. Through consultation with SHPO, a strategy will be developed to ensure adequate treatment, characterization and interpretation of site contexts. The approach taken will be dependent on the nature and extent of *in situ* deposits and will be closely coordinated with the SHPO. Finally, the data recovery plan will incorporate provisions for public outreach in the form of a published report of no less than 8 pages that, among other things, will present interpretations of the data recovery efforts and of the known and suspected historic contexts represented at 13PK61. Such report shall be placed at the Des Moines Public Library.
3. All intact features, midden deposits and structural remains associated with the Fort Des Moines No. 2, the early settlement of Des Moines known as Ft. Des Moines, and any prehistoric components that may be present within the project APE will be fully mitigated through data recovery and recordation procedures when in-place preservation of the entire feature or deposit is not practicable. Intact artifact deposits and features associated with the post-1870 development of Des Moines will be subject to an archaeological sampling strategy that will be developed in consultation with the SHPO. The methods and procedures set forth in the data recovery plan will be consistent, but not necessarily the same, as those pursued during previous data recovery exercises at other location of 13PK61.
4. The signatories concur that the accomplishment of Tasks A (Land Use History) and B (Geoarchaeological Investigations), of necessity, may precede the formal execution of this agreement; and, that the implementation of Task C (archaeological data recovery) may commence immediately upon execution of this MOA and completion of Tasks A and B.
5. The principal investigator shall compile a report documenting the data recovery and analytical activities. The report format will be consistent with standards outlined in the SHPO's *Guidelines for Archaeological Investigations in Iowa*. Among other things, the report will detail field and laboratory procedures, describe the features and artifacts recovered, discuss the current, past, and present perceptions of the historic contexts represented at 13PK61, and synthesize the data recovered to further an understanding of those historic contexts. The report will include itemized catalogs of the artifacts recovered and features observed in the field. Review and acceptance of the data recovery report by the Iowa SHPO will serve to document compliance with Stipulation II of this Memorandum of Agreement.
6. The City will ensure that the artifacts, field notes, and associated documentation resulting from this data recovery effort will be permanently stored at the curation facility located at the Office of the State Archaeologist in Iowa City or at an accredited facility that applies similar curation standards.

### D. Preservation

1. In consultation with SHPO, the City shall devise and implement a security plan that will allow for the protection of archaeological resources against vandalism, looting, and other unauthorized activities during data recovery.

2. In consultation with SHPO, the City will prepare and execute a plan to take into account the long-term preservation of all significant archaeological deposits and features that will be avoided by construction.

## II. ADMINISTRATIVE CONDITIONS

- A. Area of Potential Effects (APE). The signatories to this MOA understand and accept the following area definition as the project APE.

- Lots 4, 5, 6, 7, 8, and 9; the vacated East/West alley lying North of and adjoining Lots 7, 8, and 9, all in Block 30, in Original Town of Fort Des Moines, all now included in and forming a part of the City of Des Moines, Iowa, except that part thereof conveyed to the City of Des Moines, Iowa, by General Warranty Deed dated February 10, 2003, and filed for record in the office of the Recorder of Polk County, Iowa on March 31, 2003, in Book 9723, at Page 86.

The City shall appropriately document and immediately notify the SHPO and other parties of subsequent changes to the project APE and shall allow them a reasonable opportunity for review and comment. If necessary, revisions to the data recovery plan shall be made by the project archaeologist and shall be submitted concurrently to the SHPO for review. The SHPO will respond to the City's notice of changes to the APE within five (5) calendar days of receipt of the notice.

- B. Unanticipated Discoveries. The City shall ensure that all provisions of NAGPRA are observed. No human remains have been recovered from 13PK61 in the past and none are anticipated to be found during this data recovery work. However, any human remains and/or grave-associated funerary objects encountered during the data recovery are protected by provisions of the Iowa Codes 144.34 and 263B.7 through 263B.9, the Iowa Administrative Code Section 685, Chapter 11 and by the Native American Graves Protection and Repatriation Act of 1990 (PL 101-601; 25 U.S.C. 3001-3013; 104 Stat. 3048-3058) and its implementing regulations at 43CFR part 10. The City shall ensure that, if human remains and/or grave associated objects are encountered, all construction and excavation activities will cease immediately within the area. The area will be secured, the material will be left in place with no further disturbance. A tarp, plastic sheeting, or other appropriate covering will be placed over the exposed remains and weighted with loose soil along the edges and the top. The SHPO and the Director of the Burials Program at the Office of the State Archaeologist of Iowa (319) 384-0740 will be contacted immediately. In the event that other discoveries of historical, architectural, or archaeological significance are encountered all construction and excavation activities will cease immediately within the area. The area will be secured, the material will be left in place with no further disturbance and the SHPO will be contacted immediately. The SHPO will respond within 48 hours of the discovery.

- C. Termination. This agreement shall be null and void if its terms are not carried out within two (2) years from the date of its execution unless the signatories agree in writing to an extension for carrying out its terms. This agreement may be terminated prior to this time by either the City of Des Moines or the SHPO upon written notice to the other party with copies furnished to the Council and the other consulting parties. Upon termination of consultation, the City will coordinate with the Council in order to fulfill its compliance obligation under NHPA. However, in the event the Project is abandoned and this MOA is terminated by City prior to any Request for Release of Funds for activities related to the Project, the City shall have no ongoing compliance obligations.

- D. Objections and Dispute Resolution. At any time during implementation of the measures set out under the Stipulations in this MOA, should a written objection to any such measure or its manner of implementation be raised by a signatory to this agreement, the City shall take the objection into account and consult as needed with the objecting party, the Iowa SHPO, or the Advisory Council on Historic Preservation to resolve the objection. The responsibility of the signatories to this MOA to carry out all actions under this MOA that are not the subject of the objection shall remain unchanged.

- E. Monitoring. Developer shall prepare a status report summarizing actions taken to implement the provisions contained herein. Developer shall submit the status report to the City, which will forward the report to the SHPO. The reports will be due in June and December of each calendar year until completion of the proposed project.
  
- F. Amendment. The signatories to this MOA may propose to amend the MOA by providing a written request for such amendment to the other signatories whereupon all parties shall consult as appropriate within thirty (30) calendar days of receipt of the written request. Any resulting amendments shall be developed in writing and shall be executed immediately upon consensus.
  
- G. Assumption and Hold Harmless. Developer hereby agrees that it shall employ at its sole expense the archaeologist, geomorphologist, and all other contractors and subcontractors, and shall timely pay of the associated costs and expenses necessary to perform the archaeological, geoarchaeological, security, investigative, data recovery, analytical, publication and reporting activities required for the full and timely performance by City of its obligations under this MOA, all to be performed under the supervision of the City's designated representative. Developer hereby agrees to promptly and fully reimburse the City for any out-of-pocket costs reasonably incurred by the City to perform the archaeological, geoarchaeological, security, investigative, data recovery, analytical, publication and reporting activities required for the full and timely performance by City of its obligations under this MOA. Any breach of Developer's obligations under this section not remedied with 30 days (or 10 business days in the event the breach is for nonpayment of money) after Developer's receipt of notice thereof from City, shall constitute a breach of the obligations secured by the Mortgage upon the site of the Metro Lofts Housing Project, which Mortgage was recorded on May 10, 2005, in Book 11057, at Pages 288-294, and such Mortgage may thereafter be foreclosed by City in accordance with its terms.

Execution of this Memorandum of Agreement by the City of Des Moines, SA Metro Lofts Limited Partnership, and the State Historic Preservation Officer of Iowa, filing of the executed MOA with the Advisory Council on Historic Preservation, and implementation of its terms evidence that the City has afforded the Council an opportunity to comment on the Metro Lofts project and its effect on historic properties, and that the City has taken into account the effect of this undertaking on historic properties.

City of Des Moines, Iowa

By: \_\_\_\_\_  
 T. M. Franklin Cownie, Mayor  
 City of Des Moines

\_\_\_\_\_  
 Date

Attest:

\_\_\_\_\_  
 Diane Rauh, Chief Deputy City Clerk

\_\_\_\_\_  
 Date

As authorized by the Des Moines City Council pursuant to Roll Call No. 09-\_\_\_\_\_ on November 23, 2009

DRAFT - DO NOT EXECUTE

\_\_\_\_\_  
Barbara Mitchell, State Historic Preservation Officer  
Community Programs Bureau State Historical Society of Iowa

\_\_\_\_\_  
Date

SA Metro Lofts Limited Partnership ("Developer")  
By: Metro Lofts, LLC, a General Partner of the Developer

By: \_\_\_\_\_  
George E. Sherman, President and Chief Manager

\_\_\_\_\_  
Date

And by: Metro Lofts GP LLC, a General Partner of the Developer

By: \_\_\_\_\_  
George E. Sherman, President and Chief Manager

\_\_\_\_\_  
Date

\_\_\_\_\_