



Roll Call Number

21-1826

Agenda Item Number

36

Date December 6, 2021

APPROVAL OF CORRECTED THIRD AMENDMENT AND RESTATED URBAN
RENEWAL DEVELOPMENT AGREEMENT
WITH THE GREATER DES MOINES BOTANICAL GARDEN

WHEREAS, by Roll Call No. 21-1756 of November 15, 2021, the City Council took action to approve the Third Amendment and Restated Urban Renewal Agreement with the Greater Des Moines Botanical Garden (“Agreement”) and an incorrect version of the Agreement was on file in the Office of the City Clerk; and

WHEREAS, a corrected version of the Agreement is now on file in the Office of the City Clerk for approval and signature by the Mayor on behalf of the City.

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

1. The preamble statements and the findings in support of the Third Amendment and Restated Urban Renewal Development Agreement contained in Roll Call No. 21-1756 are hereby ratified and confirmed.

2. The Third Amendment and Restated Urban Renewal Development Agreement with the Botanical Garden which is now on file in the Office of the City Clerk is hereby approved and the Mayor is hereby authorized and directed to sign the Agreement on behalf of the City and the City Clerk is hereby authorized and directed to attest to the Mayor’s signature and affix the seal of the City, and said approved Agreement shall supplant the prior version of the Agreement that was on file in conjunction with the adoption of Roll Call No. 21-1756.

3. Upon satisfaction of the conditions for payment of future installments of the \$2,900,000 economic development grant pursuant to Article 1 of the of the Third Amendment and Restated Urban Renewal Development Agreement and confirmation of same by the City Manager and the Legal Department, the Finance Department is hereby authorized and directed to advance the installments of the grant to the Botanical Garden in accordance with the terms of the Agreement.



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4. The City Manager or his designees are hereby authorized and directed to administer the Third Amendment and Restated Urban Renewal Development Agreement on behalf of the City, and to monitor compliance by the Botanical Garden with the terms and conditions of the Agreement.

Moved by Gatto to adopt.

APPROVED AS TO FORM:

/s/ Lawrence R. McDowell
Lawrence R. McDowell
Deputy City Attorney

COUNCIL ACTION	YEAS	NAYS	PASS	ABSENT
COWNIE				
BOESEN				
GATTO				
GRAY				
MANDELBAUM				
VOSS				
WESTERGAARD				
TOTAL				

CERTIFICATE

I, P. Kay Cmelik, 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.

P. M. Frankin Cownie
Mayor

P. Kay Cmelik
City Clerk

**THIRD AMENDMENT AND RESTATED URBAN
RENEWAL
DEVELOPMENT AGREEMENT**

**METRO CENTER URBAN RENEWAL PROJECT
(Botanical Center)**

By and Between

CITY OF DES MOINES, IOWA

and

THE GREATER DES MOINES BOTANICAL GARDEN

Approved by City Council:

Date: December 6, 2021

Roll Call No. 21- 1826

This THIRD AMENDMENT and RESTATED URBAN RENEWAL DEVELOPMENT AGREEMENT, (hereinafter called the "Agreement"), is made on or as of the 6th day of December, 2021 (the "Effective Date"), by and between the CITY OF DES MOINES, IOWA, a municipal corporation, having its offices at City Hall, 400 Robert D. Ray Drive, Des Moines, Iowa (hereinafter called "City"), acting pursuant to Chapter 15A and Chapter 403 of the Code of Iowa, (hereinafter called "Urban Renewal Law"), and The Greater Des Moines Botanical Garden, an Iowa not-for-profit corporation, having its offices at 909 Robert D. Ray Drive (hereinafter called "Developer") (each individually, a "Party," and collectively, "Parties").

WITNESSETH:

WHEREAS, in furtherance of the objectives of the Urban Renewal Law, City has undertaken a program for the clearance and reconstruction or rehabilitation of slum and blighted areas in the City, specifically to stimulate economic revitalization of the downtown area and to contribute to the public health, safety and welfare and in this connection is engaged in carrying out an urban renewal project known as the Metro Center Urban Renewal Project (hereinafter called "Project") in an area (hereinafter called "Project Area") located in the City of Des Moines; and,

WHEREAS, as of the date of this Third Amendment there has been prepared and approved by City a plan for the Project, consisting of the Urban Renewal Plan adopted by the City Council on March 3, 2000 and recorded among the land records in the Office of the Recorder for Polk County, Iowa at Book 8491, Page 645 and Book 8491-721, as has been amended up through and including the 27th Amendment recorded at Book 18298, Page 719 (which plan, as so amended is hereinafter called the "Urban Renewal Plan"); and,

WHEREAS, the City and Developer entered into the original Agreement dated May 9, 2011 to provide an Economic Development Grant (the "Grant") to support the enhanced operation, management and maintenance of the Botanical Center and this Agreement has been amended by a First Amendment dated July 29, 2013 and a Second Amendment dated December 22, 2014; and

WHEREAS, the City and Developer entered into a Lease and Operation, Management and Maintenance Agreement dated May 9, 2011 as has been amended by a Third Amendment commensurate with this Third Amendment to incorporate a Master Plan Refresh reflecting expansion improvements (hereinafter called "Lease"), for the City of Des Moines Botanical Center and all adjacent grounds and accessory structures located at 909 Robert D. Ray Drive including the development of a seven acre garden expansion (hereinafter called "Property" or "Botanical Center"); and,

WHEREAS, in accordance with the terms of the amended Lease, the Developer is responsible for the timely funding and construction of substantial additional capital improvements that have commenced, including replacement of existing building systems, renovations, other replacements and enhancements to building and structural components, and the timely construction and completion of expanded gardens and buildings for the Botanical Center, and is responsible for the enhanced operation, management and maintenance of the Botanical Center to serve, in part, as a positive asset to business development in the Project Area, downtown, and the City; and,

WHEREAS, in accordance with the terms of this Agreement, the City has paid to Developer installments on an Economic Development Grant totaling \$1,600,000.00 and paid to Developer an Additional Economic Development Grant of \$150,000.00, and in recognition of the obligations assumed by the Developer under the amended Lease to timely invest in and construct substantial additional capital improvements, including replacement of existing building systems, renovations, other replacements and enhancements to building and structural components, and the timely construction and completion of expanded gardens and buildings for the Botanical Center, the City agrees to extend and increase the Economic Development Grant in future installments totaling \$2,900,000.00 to support the enhanced operation, management and maintenance of the Botanical Center and to place the Developer on solid foundation for continuous long-term operation of the Botanical Center as a first-class amenity with no further grant support from the City after payment of the last and final Economic Development Grant installment; and,

WHEREAS, it has been determined that the performance of the Developer's obligations under this Agreement will continue to generate the following public gains and benefits: (i) it will initiate the further improvement and expansion of the Botanical Center in accordance with the Urban Renewal Plan; (ii) it will continue to encourage further private investment and will attract and retain other businesses in the Project Area; (iii) it will continue to encourage the creation and retention of job opportunities within the Project Area which might otherwise be lost; (iv) it will continue to help to maintain and expand taxable values in the Project Area; and, (v) it will have a continued and greater positive economic impact on the City by enhancing the quality of life within the City and by contributing to the City's efforts to retain and attract a skilled workforce and promote economic growth; and,

WHEREAS, the substantial additional capital improvements, including replacement of existing building systems, renovations, other replacements and enhancements to building and structural components, and the timely construction and completion of expanded gardens and buildings for the Botanical Center, and enhanced operation, management and maintenance of the Botanical Center pursuant to the amended Lease furthers the objectives of the Urban Renewal Plan to preserve and create an environment which will protect the health, safety and general welfare of City's residents and maintain taxable values within the Project Area, to establish conditions which will attract new investments and prevent recurrence of blight and blighting conditions, to provide for orderly expansion of downtown Des Moines as a retail, financial, business, and cultural center of the metropolitan area, to encourage and support development which will enhance and make the best possible use of riverfront, cultural, and other public facilities, resources and investments, to provide facilities that will meet the recreation, educational, and cultural needs of persons who work and live in and near the Project Area, to provide facilities that will enhance the use and enjoyment of the Des Moines riverfront and City parks by persons who work and live in the area as well as City residents and visitors to the downtown, and to support the maintenance and rehabilitation of sound existing structures and the preservation of properties of architectural merit; and,

WHEREAS, the provision of the extended and increased economic development assistance from the City is necessary to enable the substantial expansion, improvement and enhanced operation, management, and maintenance of the Botanical Center in accordance with the terms of the amended Lease and this Agreement and such assistance will generate public gains and benefits

for urban renewal and economic development which gains and benefits are warranted in comparison with the amount of such assistance; and,

WHEREAS, City believes that the substantial expansion, improvement, and enhanced operation, management and maintenance to the Botanical Center pursuant to the amended Lease and this Agreement, the intangible interest the City will retain through the actions of the Developer in furtherance of the Urban Renewal Plan and the fulfillment generally of this Agreement, are in the vital and best interests of City and the health, safety, morals, and welfare of its residents, and in accord with the public purposes and provisions of the applicable state and local laws and requirements under which the Project has been undertaken, and warrant the provision of the economic assistance set forth in this Agreement.

NOW, THEREFORE, in consideration of the premises and the mutual obligations of the Parties hereto, each of them does hereby covenant and agree with the other as follows:

ARTICLE 1. ECONOMIC DEVELOPMENT GRANT

Section 101. Duty to Comply with Lease. Developer shall comply with all of the terms, conditions and covenants of the amended Lease, including the requirements to timely fund and construct substantial additional capital improvements for the replacement of existing building systems, renovations, other replacements and enhancements to building and structural components and to timely construct and complete expanded gardens and buildings for the Botanical Center (“Improvements”) in accordance with the Master Plan Refresh documents incorporated in the amended Lease and including the requirements for the enhanced operation, management and maintenance of the Botanical Center.

Section 102. Basis for Assistance. In consideration of Developer’s obligation to comply with the terms, conditions and covenants of the amended Lease including the requirements to timely fund and construct the Improvements and in consideration of the economic development and employment opportunities that will be retained and created in and around the Project Area as a result of the Developer’s undertakings under the amended Lease, the City shall cause to be provided the extended and increased economic development grant identified in this Article.

Section 103. Economic Development Grant.

- A. As of the Effective Date, the City has paid semi-annual installments of the Economic Development Grant the (“Installments”) totaling One Million, Six Hundred Thousand and no/100 Dollars (\$1,600,000.00). Provided Developer has first satisfied the applicable conditions precedent applicable to each Grant installment set forth in paragraph B, then subject to Section 104, the City shall pay to Developer the extended and increased Economic Development Grant in the additional total amount of Two Million, Nine Hundred Thousand and no/100 Dollars (\$2,900,000.00) payable in eighteen semi-annual installments as set out in this Paragraph. Developer shall utilize the Economic Development Grant proceeds exclusively for the costs related to the enhanced operation, management and maintenance of the Botanical Center in accordance with the terms, conditions and covenants of the amended Lease.

Installment 1, in the amount of \$175,000 paid December 1, 2021
Installment 2, in the amount of \$175,000 paid June 1, 2022
Installment 3, in the amount of \$175,000 paid December 1, 2022
Installment 4, in the amount of \$175,000 paid June 1, 2023
Installment 5, in the amount of \$200,000 paid December 1, 2023
Installment 6, in the amount of \$200,000 paid June 1, 2024
Installment 7, in the amount of \$200,000 paid December 1, 2024
Installment 8, in the amount of \$200,000 paid June 1, 2025
Installment 9, in the amount of \$200,000 paid December 1, 2025
Installment 10, in the amount of \$200,000 paid June 1, 2026
Installment 11, in the amount of \$200,000 paid December 1, 2026
Installment 12, in the amount of \$200,000 paid June 1, 2027
Installment 13, in the amount of \$125,000 paid December 1, 2027
Installment 14, in the amount of \$125,000 paid June 1, 2028
Installment 15, in the amount of \$100,000 paid December 1, 2028
Installment 16, in the amount of \$100,000 paid June 1, 2029
Installment 17, in the amount of \$75,000 paid December 1, 2029
Installment 18, in the amount of \$75,000 paid June 1, 2030

B. The obligation of the City to pay to Developer Installments one (1) through six (6) of the Economic Development Grant is contingent upon Developer having first satisfied the following conditions:

1. Developer continues to operate and manage the Botanical Center in a manner open to the general public in accordance with terms, conditions and covenants of the amended Lease and Developer continues to maintain, repair and restore the Botanical Center and Improvements constructed thereon in compliance with all terms, conditions and covenants of the amended Lease.
2. Developer has submitted to the City documentation acceptable to the City that it has utilized proceeds from the prior Grant installments exclusively for the enhanced operation, management and maintenance of the Botanical Center in accordance with the terms, conditions and covenants of the amended Lease.
3. Developer has submitted to the City by November 15, 2021, documentation acceptable to the City that it has obtained at least \$2,400,000 of committed non-City funding for completion of construction and installation of Botanical Center improvements , including but not limited to, heating, ventilation and air conditioning (HVAC) and boiler system replacement and expanded gardens and buildings completed after January 1, 2020..

The obligation of the City to pay to Developer Installments seven (7) through twelve (12) is contingent upon the Developer having first satisfied the following condition in addition to conditions one (1) and two (2) above:

4. Developer has submitted to the City by November 15, 2024, documentation acceptable to the City that Developer has completed Botanical Center improvements, including but not limited to, the heating, ventilation and air conditioning (HVAC) and boiler system replacement at a cost of at least \$2,400,000 and consisting of expanded gardens and buildings completed after January 1, 2020 at a cost of at least \$3,000,000 in accordance with the terms of the amended Lease and the Master Plan Refresh documents incorporated in the amended Lease. If Developer fails to timely submit such documentation but submits such documentation acceptable to the City within a grace period extending to September 15, 2025, the City shall pay to Developer the Grant installment(s) withheld and resume the scheduled payments of succeeding Grant installments. If Developer fails to submit such documentation within the grace period, all Installment(s) withheld and all succeeding Installments shall terminate.

The obligation of the City to pay to Developer Installments thirteen (13) through sixteen (16) is contingent upon the Developer having first satisfied the following condition in addition to conditions one (1) and two (2) above:

5. Developer has submitted to the City by November 15, 2027, documentation acceptable to the City that Developer has completed Botanical Center improvements, including but not limited to, expanded gardens and buildings completed after January 1, 2020 at a cost of at least \$6,000,000 in accordance with the terms of the amended Lease and the Master Plan Refresh documents incorporated in the amended Lease. If Developer fails to timely submit such documentation but submits such documentation acceptable to the City within a grace period extending to September 15, 2028, the City shall pay to Developer the Grant installment(s) withheld and resume the scheduled payments of succeeding Grant installments. If Developer fails to submit such documentation within the grace period, all Installment(s) withheld and all succeeding Installments shall terminate.

The obligation of the City to pay to Developer Installments seventeen (17) and eighteen (18) is contingent upon the Developer having first satisfied the following additional condition in addition to conditions one (1) and two (2) above:

6. Developer has submitted to the City by November 15, 2029, documentation acceptable to the City that Developer has completed Botanical Center improvements, including expanded gardens and buildings completed after January 1, 2020 at a cost of at least \$8,000,000 in accordance with the terms of the amended Lease and the Master Plan Refresh documents incorporated in the amended Lease. If Developer fails to timely submit such documentation but submits such documentation acceptable to the City within a grace period extending to September 15, 2030, the City shall pay to Developer the Grant installment(s) withheld and resume the scheduled payments of succeeding Grant installments. If Developer fails to submit such documentation within the

grace period, all Installment(s) withheld and any succeeding Installments shall terminate.

Section 103A. (Not used. As of Effective Date, payment of and terms and conditions relating to Additional Economic Development Grant have been performed and satisfied.)

Section 104. Non-appropriation/Limited Source of Funding.

- A. Notwithstanding anything in this Agreement to the contrary, the obligation of the City to pay any individual Installments of the Economic Development Grant shall be an annual obligation limited to currently budgeted funds, and not a general obligation or other indebtedness of the City or a pledge of its full faith and credit under the meaning of any constitutional or statutory debt limitation, and shall be subject in all respects to the right of non-appropriation by the City Council as provided in this Section. The City may exercise its right of non-appropriation as to the amount of the Grant to be paid during any fiscal year during the term of this Agreement.
- B. In the event the City Council of City elects to not appropriate sufficient funds in the budget for the full payment of the Installments on the Grant when due pursuant to this Agreement, then the City shall have no further obligation to the Developer for the payment of the Installments of the Grant which cannot be paid with the funds then appropriated for that purpose.
- C. The Installments on the Grant shall be paid by City solely from funds appropriated for that purpose by the City Council from taxes levied in the Project Area that are allocated to the special fund pursuant to Iowa Code § 403.19(2) or from special sourced Federal or State grant funds.
- D. The right of non-appropriation reserved to the City in this Section is intended by the Parties, and shall be construed at all times, so as to ensure that the City's obligation to pay future Installments on the Grant shall not constitute a legal indebtedness of the City within the meaning of any applicable constitutional or statutory debt limitation prior to the adoption of a budget which appropriates funds for the payment of that installment or amount. In the event that any of the provisions of this Agreement are determined by a court of competent jurisdiction to create, or result in the creation of, such a legal indebtedness of the City, the enforcement of the said provision shall be suspended, and the Agreement shall at all times be construed and applied in such a manner as will preserve the foregoing intent of the Parties, and no event of default shall be deemed to have occurred as a result thereof. To this end the provisions of this Section are severable.

Section 105. Accounting of Grant Expenditures. If any portion of the Grant is funded by special sourced Federal or State grant funds, Developer shall complete all reporting requirements as directed by the City necessary to document use of the Grant proceeds in compliance with all such sourced government grant requirements and conditions including applicable regulations. In addition, prior to the six-month anniversary of the payment of the final Installment, Developer

shall submit documentation and final accounting acceptable to the City that all Grant proceeds have been used exclusively for the costs related to the operation, management and maintenance of the Botanical Center in accordance with the terms, conditions and covenants of the amended Lease. If the City is required to repay special sourced Federal or State grant funds as a result of Developer's failure to complete all reporting requirements as directed by the City necessary to document use of Grant proceeds in compliance with all sourced government grant requirements and conditions including applicable regulations or if Developer uses any Grant proceeds for a purpose other than those authorized under the amended Lease, such Grant proceeds shall be reimbursed to the City promptly upon the City's demand therefore.

ARTICLE 2. MISCELLANEOUS.

Section 201. Representatives Not Individually Liable.

- A. No member, official, or employee of City nor any officer, board member, or employee of Developer shall be personally liable in the event of any default or breach by either Party or for any amount which may become due on any obligations under the terms of this Agreement.
- B. Notwithstanding anything contained in this Agreement to the contrary, the person or persons executing this Agreement on behalf of either Party shall incur no personal liability with respect to either Party's performance hereunder.

Section 202. City Not a Guarantor, Surety or Partner. City is not a guarantor or surety for the Botanical Center improvements nor for any indebtedness incurred by Developer. It is mutually understood that nothing in this Agreement is intended or shall be construed as in any way creating or establishing the relationship of copartners between the Parties hereto, or as constituting Developer as a contractor, agent or representative of City for any purpose of in any manner whatsoever.

Section 203. Interpretation of Contract.

- A. *Titles of Articles and Sections.* Titles of the several sections, subsections, and paragraphs of this Agreement are inserted for convenience of reference only and shall be disregarded in construing or interpreting any of the provisions of this Agreement.
- B. *Choice of Laws.* This Agreement shall be construed in accordance with the laws of the State of Iowa.
- C. *Timing.* Time is of the essence in the performance of this Agreement.
- D. *Non-working Days.* In the event the last date for performing any act required by this Agreement falls upon a weekend day or holiday, then the time for performing such act shall be extended to the next following working day.

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

Section 204. WAIVER OF JURY TRIAL. CITY AND DEVELOPER EACH HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY INSTRUMENT OR DOCUMENT DELIVERED HEREUNDER.

Section 205. Agreement Binding on Successors in Interest. This Agreement shall in to the benefit of and shall be binding upon successors and assigns of the Parties.

Section 206. Notices. A notice, demand, or other communication under this Agreement by either Party to the other shall be sufficiently given or delivered if it is dispatched by registered or certified mail, postage prepaid, return receipt requested; delivered personally; or sent by overnight courier service, as follows:

(a) in the case of Developer, addressed to:

The Greater Des Moines Botanical Garden
909 Robert D. Ray Drive
Des Moines, IA 50309
Attn: President and CEO

(b) in the case of City, addressed to:

City of Des Moines
400 Robert D. Ray Drive
Des Moines, Iowa, 50309
Attn: City Manager

or to such other address, Department, or individual as either may, from time to time, designate in writing and forward to the other as provided in this Article.

IN WITNESS WHEREOF, the Parties have caused this Agreement to be duly executed on or as of the day first above written.

"Developer"

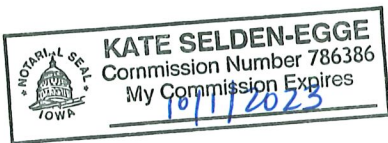
THE GREATER DES MOINES BOTANICAL GARDEN

By: Kimberley Perez
Kimberley Perez, President and CEO

STATE OF IOWA)
) SS.
COUNTY OF POLK)

On this 19th day of NOVEMBER, 2021, before me, a Notary Public in and for the State of Iowa, personally appeared KIMBERLEY PEREZ to me personally known, who being by me duly sworn, did state that he/she is the President and CEO of The Greater Des Moines Botanical Garden, executing the within and foregoing instrument; that the instrument was signed on behalf of the corporation, by authority of its Board of Directors; and that KIMBERLEY PEREZ acknowledged the execution of the instrument to be the voluntary act and deed of the corporation by it and by him/her voluntarily executed.

Kate Selden Egge
Notary Public in the State of Iowa



"City"

CITY OF DES MOINES, IOWA

ATTEST:

By: *Kay Cmelik*
Kay Cmelik, City Clerk

By: *T.M. Franklin Cownie*
T.M. Franklin Cownie, Mayor

APPROVED AS TO FORM:

/s/ Lawrence R. McDowell
Lawrence R. McDowell
Deputy City Attorney

STATE OF IOWA)
) ss:
COUNTY OF POLK)

On this 6th day of December, 2021, before me, the undersigned, a Notary Public in the State of Iowa, personally appeared T.M. FRANKLIN COWNIE and KAY CMELIK, to me personally known, and who, being by me duly sworn did state that they are the Mayor and City Clerk, respectively, of City of Des Moines, Iowa, a municipal corporation; that the instrument was signed on behalf of City of Des Moines, Iowa, by authority of its City Council, as contained in the Resolution adopted by City Council under Roll Call No. 21- 1826 of City Council on the 6th day of December, 2021, and that T.M. FRANKLIN COWNIE and KAY CMELIK acknowledged the execution of the instrument to be the voluntary act and deed of City of Des Moines, Iowa, by it and by them voluntarily executed.

Sandi L. Deery
Notary Public in the State of Iowa

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