

PERFORMANCE AGREEMENT

This **PERFORMANCE AGREEMENT** between **CLOUD 9 MANAGEMENT, LLC**, a Texas limited liability company (hereinafter referred to as the “Developer”), and the **BARTONVILLE COMMUNITY DEVELOPMENT CORPORATION**, a Texas non-profit corporation (hereinafter referred to as the “BCDC”), is made and executed on the following recitals, terms and conditions.

WHEREAS, BCDC is an economic development corporation operating pursuant to Chapter 505 of the Texas Local Government Code, as amended (also referred to as the “Act”), and the Texas Non-Profit Corporation Act, as codified in the Texas Business Organizations Code, as amended; and

WHEREAS, Section 501.103 of the Texas Local Government Code, in pertinent part, defines the term “project” to mean “expenditures that are found by the board of directors to be required or suitable for infrastructure necessary to promote or develop new or expanded business enterprises, limited to: (1) streets and roads, rail spurs, water and sewer utilities, electric utilities, or gas utilities, drainage, site improvements, and related improvements; (2) telecommunications and Internet improvements . . .”; and

WHEREAS, Section 505.158 of the Texas Local Government Code provides that “[f]or a Type B corporation authorized to be created by a municipality with a population of 20,000 or less, “project” also includes the land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements found by the corporation’s board of directors to promote new or expanded business development.” Further, the statute provides that “[a] Type B corporation may not undertake a project authorized by this section that requires an expenditure of more than \$10,000 until the governing body of the corporation’s authorizing municipality adopts a resolution authorizing the project after giving the resolution at least two separate readings”; and

WHEREAS, Section 501.158 of the Texas Local Government Code prohibits the provision of a direct incentive unless BCDC enters into an Agreement with Developer providing at a minimum a schedule of additional payroll or jobs to be created or retained by BCDC’s investment; a schedule of capital investments to be made as consideration for any direct incentives provided by BCDC to Developer; and a provision specifying the terms and conditions upon which repayment must be made should Developer fail to meet the agreed to performance requirements specified in this Agreement; and

WHEREAS, Developer has applied to the BCDC for financial assistance for the construction of Qualified Expenditures to be made to the Property generally located at 2660 F.M. 407 E, Town of Bartonville, Texas; and

WHEREAS, the BCDC’s Board of Directors have determined the financial assistance provided to Developer for the Qualified Expenditures to be made to the Property is consistent with and meets the definition of “project” as that term is defined in Sections 501.103 and 505.158 of the Texas Local Government Code; and the definition of “cost” as that term is defined by Section

501.152 of the Texas Local Government Code; and

WHEREAS, Developer agrees and understands that Section 501.073(a) of the Texas Local Government Code requires the Town Council of the Town of Bartonville, Texas, to approve all programs and expenditures of the BCDC, and accordingly this Agreement is not effective until Town Council has approved this project at a Town Council meeting called and held for that purpose.

NOW, THEREFORE, for and in consideration of the agreements contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the BCDC and Developer agree as follows:

SECTION 1. FINDINGS INCORPORATED.

The foregoing recitals are hereby incorporated into the body of this Agreement and shall be considered part of the mutual covenants, consideration and promises that bind the parties.

SECTION 2. TERM.

This Agreement shall be effective as of the Effective Date, as defined herein, and shall continue thereafter until **March 31, 2028**, unless terminated sooner under the provisions hereof.

SECTION 3. DEFINITIONS.

The following words shall have the following meanings when used in this Agreement.

- (a) **Act.** The word “Act” means Chapters 501 to 505 of the Texas Local Government Code, as amended.
- (b) **Agreement.** The word “Agreement” means this Performance Agreement, together with all exhibits and schedules attached to this Performance Agreement from time to time, if any.
- (c) **BCDC.** The term “BCDC” means the Bartonville Community Development Corporation, a Texas non-profit corporation, its successors and assigns, whose corporate address for the purposes of this Agreement is 1941 East Jeter Road, Bartonville, Texas 76226.
- (d) **Developer.** The word “Developer” means Cloud 9 Management, LLC, a Texas limited liability company, and its successors and assigns, whose address for the purposes of this Agreement is 2660 FM 407 E, Bartonville, Texas 76226.
- (e) **Effective Date.** The words “Effective Date” mean the date of the latter to execute this Agreement by and between the Developer and the BCDC.

- (f) **Event of Default.** The words “Event of Default” mean and include any of the Events of Default set forth below in the section entitled “Events of Default.”
- (g) **Full-Time Equivalent Employment Positions.** The words “Full-Time Equivalent Employment Position” or “Full-Time Equivalent Employment Positions” mean and include a job requiring a minimum of One Thousand Nine Hundred Twenty (1,920) hours of work averaged over a twelve (12) month period.
- (h) **Property.** The word “Property” means Lot 1R - 4, Block A of the Denkman Plaza Addition, an addition to the Town of Bartonville, Denton County, Texas, and generally located at 2660 F.M. 407 E, Bartonville, Texas.
- (i) **Qualified Expenditures.** The words “Qualified Expenditures” mean those expenditures consisting of construction of a minimum 15,000 square foot hair salon and retail establishment located on the Property, and Property acquisition costs, and those expenses which otherwise meet the definition of “project” as that term is defined by Sections 501.103 and 505.158 of the Act, and the definition of “cost” as that term is defined by Section 501.152 of the Act.
- (j) **Related Documents.** The words “Related Documents” mean and include without limitation all promissory notes, loan agreements, and all other instruments and documents, whether now or hereafter existing, executed in connection with this Agreement.
- (k) **Term.** The word “Term” means the term of this Agreement as specified in Section 2 of this Agreement.

SECTION 4. AFFIRMATIVE COVENANTS OF DEVELOPER.

Developer covenants and agrees with BCDC that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Qualified Expenditures.** Developer covenants and agrees to submit to the BCDC invoices, receipts, or other documentation in a form acceptable to the BCDC for the Qualified Expenditures made to the Property in a minimum amount of **Four Million and No/100 Dollars (\$4,000,000.00)** by **December 31, 2024**.
- (b) **Certificate of Occupancy.** Developer covenants and agrees to obtain or cause to be obtained by **December 31, 2024**, a certificate of occupancy from the Town of Bartonville, Texas, for a minimum of 15,000 square foot hair salon and retail establishment located on the Property.
- (c) **Operate Cloud 9 Establishment.** Developer covenants and agrees by **January 1, 2025**, and during the Term of this Agreement to keep open to the general public the Cloud 9 Hair

Salon Establishment located on the Property.

- (d) **Job Creation and Retention.** Developer covenants and agrees by **January 1, 2025**, and during the Term of this Agreement to employ and maintain a minimum of ten (10) Full-Time Equivalent Employment Positions and fifty (50) self-employed positions working at the Property. Developer covenants and agrees beginning on **February 1, 2025**, and during the Term of this Agreement, Developer shall deliver to BCDC an annual compliance verification signed by a duly authorized representative of Developer that shall certify the number of Full-Time Equivalent Employment Positions, and shall disclose and certify the average wage for all Full-Time Equivalent Employment Positions (the “Annual Compliance Verification”). The Developer covenants and agrees beginning on **February 1, 2025**, and annually thereafter during the Term of this Agreement, there will be a total of **four (4)** Annual Compliance Verifications due and submitted to the BCDC covering the Full-Time Equivalent Employment Positions created and maintained during the Term of this Agreement. All Annual Compliance Verifications shall include quarterly IRS 941 returns, or Texas Workforce Commission Employer Quarterly Reports.
- (e) **Performance.** Developer agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements between Developer and BCDC.

SECTION 5. AFFIRMATIVE COVENANTS OF BCDC.

BCDC covenants and agrees with Developer that, while this Agreement is in effect, it shall comply with the following terms and conditions:

- (a) **Reimbursement for Qualified Expenditures.** BCDC covenants and agrees to submit reimbursement for Qualified Expenditures made by the Developer pursuant to Section 4(a) of this Agreement, in the amount not to exceed **Forty-Five Thousand and No/100 Dollars (\$45,000.00)** as follows:
 - (1) **Twenty-Two Thousand Five Hundred and No/100 Dollars (\$22,500.00)** paid to Developer within thirty (30) days of the Effective Date of this Agreement and compliance with Section 505.160 of the Act; and
 - (2) **Twenty-Two Thousand Five Hundred and No/100 Dollars (\$22,500.00)** paid to Developer within thirty (30) days of Developer’s receipt of the certificate of occupancy consistent with Section 4(b) of this Agreement.
- (b) **Performance.** BCDC agrees to perform and comply with all terms, conditions, and provisions set forth in this Agreement and in all other instruments and agreements between Developer and BCDC.

SECTION 6. CESSATION OF ADVANCES.

If BCDC has made any commitment to make any financial assistance to Developer, whether under this Agreement or under any other agreement, BCDC shall have no obligation to advance or disburse financial assistance if: (i) Developer becomes insolvent, files a petition in bankruptcy or similar proceedings, or is adjudged bankrupt; or (ii) an Event of Default occurs.

SECTION 7. EVENTS OF DEFAULT.

Each of the following shall constitute an Event of Default under this Agreement:

- (a) **General Event of Default.** Failure of Developer or BCDC to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement, or failure of Developer or BCDC to comply with or to perform any other term, obligation, covenant or condition contained in any other agreement by and between Developer and BCDC is an Event of Default.
- (b) **False Statements.** Any warranty, representation, or statement made or furnished to the BCDC by or on behalf of Developer under this Agreement that is false or misleading in any material respect, either now or at the time made or furnished is an Event of Default.
- (c) **Insolvency.** Developer's insolvency, appointment of receiver for any part of Developer's property, any assignment for the benefit of creditors of Developer, any type of creditor workout for Developer, or the commencement of any proceeding under any bankruptcy or insolvency laws by or against Developer is an Event of Default.
- (d) **Ad Valorem Taxes.** Developer allows its ad valorem taxes owed to the Town of Bartonville, Texas, to become delinquent and fails to timely and properly follow the legal procedures for protest and/or contest of such taxes and to cure such failure within thirty (30) days after written notice thereof from BCDC and/or Denton County Central Appraisal District is an Event of Default.

SECTION 8. EFFECT OF AN EVENT OF DEFAULT.

In the event of default under Section 7 of this Agreement, the non-defaulting party shall give written notice to the other party of any default, and the defaulting party shall have thirty (30) days to cure said default. Should said default remain uncured as of the last day of the applicable cure period, and the non-defaulting party is not otherwise in default, the non-defaulting party shall have the right to immediately terminate this Agreement, enforce specific performance as appropriate, or maintain a cause of action for damages caused by the event(s) of default. In the event, Developer defaults and is unable or unwilling to cure said default within the prescribed time period, the amounts provided by BCDC to Developer pursuant to Section 5(a) of this Agreement shall become immediately due and payable by Developer to BCDC as follows:

- (a) Event of Default occurs from the Effective Date through **March 31, 2024**, repay **Forty-Five Thousand and No/100 Dollars (\$45,000.00)** or as much as has been advanced to Developer by BCDC;
- (b) Event of Default occurs from **April 1, 2024, to March 31, 2025**, repay **Thirty-Six Thousand and No/100 Dollars (\$36,000.00)**;
- (c) Event of Default occurs from **April 1, 2025, to March 31, 2026**, repay **Twenty-Seven Thousand and No/100 Dollars (\$27,000.00)**;
- (d) Event of Default occurs from **April 1, 2026, to March 31, 2027**, repay **Eighteen Thousand and No/100 Dollars (\$18,000.00)**; and
- (e) Event of Default occurs from **April 1, 2027, to March 31, 2028**, repay **Nine Thousand and No/100 Dollars (\$9,000.00)**.

SECTION 9. INDEMNIFICATION.

TO THE EXTENT ALLOWED BY LAW, EACH PARTY AGREES TO RELEASE, DEFEND, INDEMNIFY, AND HOLD HARMLESS THE OTHER (AND ITS OFFICERS, AGENTS, AND EMPLOYEES) FROM AND AGAINST ALL CLAIMS OR CAUSES OF ACTION FOR INJURIES (INCLUDING DEATH), PROPERTY DAMAGES (INCLUDING LOSS OF USE), AND ANY OTHER LOSSES, DEMAND, SUITS, JUDGMENTS AND COSTS, INCLUDING REASONABLE ATTORNEYS' FEES AND EXPENSES, IN ANY WAY ARISING OUT OF, RELATED TO OR RESULTING FROM ITS PERFORMANCE UNDER THIS AGREEMENT, OR CAUSED BY ITS NEGLIGENT ACTS OR OMISSIONS (OR THOSE OF ITS RESPECTIVE OFFICERS, AGENTS, EMPLOYEES, OR ANY OTHER THIRD PARTIES FOR WHOM IT IS LEGALLY RESPONSIBLE) IN CONNECTION WITH PERFORMING THIS AGREEMENT.

SECTION 10. MISCELLANEOUS PROVISIONS.

The following miscellaneous provisions are a part of this Agreement:

- (a) **Amendments.** This Agreement, together with any Related Documents, constitutes the entire understanding and agreement of the parties as to the matters set forth in this Agreement. No alteration of or amendment to this Agreement shall be effective unless given in writing and signed by the party or parties sought to be charged or bound by the alteration or amendment.
- (b) **Applicable Law and Venue.** This Agreement shall be governed by and construed in accordance with the laws of the State of Texas, and all obligations of the parties created

hereunder are performable in Denton County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of Denton County, Texas.

- (c) **Assignment.** This Agreement may not be assigned without the express written consent of the other party.
- (d) **Binding Obligation.** This Agreement shall become a binding obligation on the signatories upon execution by all signatories hereto. Developer warrants and represents that the individual or individuals executing this Agreement on behalf of Developer has full authority to execute this Agreement and bind Developer to the same. BCDC warrants and represents that the individual executing this Agreement on its behalf has full authority to execute this Agreement and bind it to the same.
- (e) **Caption Headings.** Caption headings in this Agreement are for convenience purposes only and are not to be used to interpret or define the provisions of the Agreement.
- (f) **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original and all of which shall constitute one and the same document.
- (g) **Notices.** Any notice or other communication required or permitted by this Agreement (hereinafter referred to as the "Notice") is effective when in writing and (i) personally delivered either by facsimile (with electronic information and a mailed copy to follow) or by hand or (ii) three (3) days after notice is deposited with the U.S. Postal Service, postage prepaid, certified with return receipt requested, and addressed as follows:
 - if to Developer: Cloud 9 Management, LLC
2660 FM 407 E
Bartonville, Texas 76226
Attn: Kim Cloud Skidmore
Telephone: _____
 - if to BCDC: Bartonville Community Development Corporation
1941 East Jeter Road
Bartonville, Texas 76226
Attn: Town Secretary
Telephone: (817) 693-5280
- (h) **Severability.** If a court of competent jurisdiction finds any provision of this Agreement to be invalid or unenforceable as to any person or circumstance, such finding shall not render that provision invalid or unenforceable as to any other persons or circumstances. If feasible, any such offending provision shall be deemed to be modified to be within the limits of enforceability or validity; however, if the offending provision cannot be so

modified, it shall be stricken and all other provisions of this Agreement in all other respects shall remain valid and enforceable.

- (i) **Time is of the Essence.** Time is of the essence in the performance of this Agreement.
- (j) **Undocumented Workers.** Developer certifies that the Developer does not and will not knowingly employ an undocumented worker in accordance with Chapter 2264 of the Texas Government Code, as amended. If during the Term of this Agreement, Developer is convicted of a violation under 8 U.S.C. § 1324a(f), Developer shall repay the amount of the public subsidy provided under this Agreement plus interest, at the rate of eight percent (8%), not later than the 120th day after the date the BCDC notifies Developer of the violation.

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DEVELOPER ACKNOWLEDGES HAVING READ ALL THE PROVISIONS OF THIS PERFORMANCE AGREEMENT, AND DEVELOPER AGREES TO ITS TERMS. THIS PERFORMANCE AGREEMENT IS EFFECTIVE AS OF THE EFFECTIVE DATE AS DEFINED HEREIN.

BCDC:

***BARTONVILLE COMMUNITY
DEVELOPMENT CORPORATION,***
a Texas non-profit corporation

By: _____

Brenda Latham, Chair

Date Signed: _____

STATE OF TEXAS

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COUNTY OF DENTON

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This instrument was acknowledged before me on the _____ day of _____, 2023, by Brenda Latham, Chair of the Bartonville Community Development Corporation, a Texas non-profit corporation, on behalf of said Texas corporation.

Notary Public, State of Texas

DEVELOPER:

CLOUD 9 MANAGEMENT, LLC,
A Texas limited liability company,

By: _____
Kim Cloud Skidmore

Title: _____

Date Signed: _____

STATE OF TEXAS

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COUNTY OF DENTON

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This instrument was acknowledged before me on the _____ day of _____, 2023, by Kim Cloud Skidmore, _____, of Cloud 9 Management, LLC, a Texas limited liability company, on behalf of said Texas company.

Notary Public, State of Texas