

PRELIMINARY DEVELOPMENT AGREEMENT

THIS PRELIMINARY DEVELOPMENT AGREEMENT ("Agreement") is made and entered into this ____ day of _____, 2019, by the City of Marshall, Minnesota, a municipal corporation under the laws of the state of Minnesota, (the "City") with its principal office at 344 W. Main Street, Marshall MN 56258, and APX Construction Group, LLC, a Minnesota limited liability company (the "Developer") with its principal office at 1020 Innovation Lane, Mankato, MN 56001.

WITNESSETH:

WHEREAS, the City previously issued a Request for Proposals (the "RFP") for the purchase and redevelopment of certain real property located in the downtown area described as Lots 1 through 5 and 15 through 20, Block 11, Lyon County (the "Property"), which RFP was dated December 21, 2018; and

WHEREAS, in response to the RFP the Developer submitted a proposal to acquire the Property to construct a mixed-use commercial/residential development and has been preliminarily selected by the City to enter into a period of exclusive negotiation related to such proposal; and

WHEREAS, the City and the Housing and Redevelopment Authority in and for the City of Marshall (the "HRA") have previously adopted plans (collectively, the "City of Marshall Comprehensive Plan") to address blighted conditions within the City through the utilization of a series of different tools and the Developer has indicated a need for financial assistance from the City; and

WHEREAS, the City of Marshall Comprehensive Plan has a goal to: create an atmosphere in the downtown area that is conducive and supportive of housing in the downtown area; encourage appropriate housing opportunities and identify and promote an appropriate mix of retail and service businesses in the downtown area; and encourage appropriate redevelopment of the downtown area; and

WHEREAS, the City and the HRA are looking towards the future, and have invested time, effort, and dollars into the acquisition of these parcels, and previously demolished other buildings once located on these parcels; and

WHEREAS, the Developer has expended time and financial resources to prepare the RFP and will continue to expend resources to meet its obligations under this Agreement; and

WHEREAS, the City and the HRA each own portions of the Property, and pursuant to the terms of this Agreement, the City shall work with the HRA to obtain singular ownership and title of the Property, and, at Developer's request, to combine the parcels of the Property before a Purchase Agreement (as hereinafter defined) is executed between the City and the Developer; and

WHEREAS, the preliminary estimates indicate a need for public financial participation from the City to offset a portion of the costs associated with the proposed development, and that the redevelopment would not occur without such public financial participation, and that public financial participation is anticipated in the form of tax increment financing (“TIF”); however, Tax Abatement, Loan(s), or a combination thereof (collectively “City Participation”), depending upon final project proforma and estimates, could be utilized; and

WHEREAS, the City Council has reviewed the Developer's proposal and desires to enter into this Agreement to provide the Developer with an exclusive period of negotiation which will allow the Developer to refine its proposal and give the parties hereto an opportunity to negotiate the terms of a purchase and development agreement for the Property and any City Participation to bring the project forth (the “Purchase Agreement”).

NOW, THEREFORE, in consideration of the covenants and obligations of the parties hereto, the City and the Developer hereby agree as follows:

Section 1. Preliminary Nature of Agreement. The City and the Developer agree that this Agreement is intended to be preliminary in nature. Before the City and the Developer can decide on whether to proceed with the implementation of the Developer's proposal, it will be necessary to assemble and consider information relative to the design, economics and other aspects of the proposed Development. The purpose of this Agreement is to allow the Developer an exclusive opportunity to assemble such necessary information, to refine the above-referenced development proposal, and to negotiate with the City concerning the execution of the Purchase Agreement which, if executed, will set forth the rights and responsibilities of the City and the Developer with respect to the sale and development of the Property.

The Developer has proposed to construct a development consisting of approximately 56 residential units and approximately 33,400 square feet of commercial space, as described in the RFP Submission from the Developer to the City of Marshall Economic Development Authority dated April 30, 2019 (the “Development”).

Section 2. Present Intent of Parties. It is the intention of the parties that this Agreement documents their present understandings and commitments and that if the following conditions can be fulfilled to the satisfaction of the City and the Developer that the parties may proceed in an attempt to formulate a mutually-satisfactory Purchase Agreement:

- (a) the Developer demonstrates the feasibility of the Development at a design and density that meets or exceeds current zoning guidelines or is otherwise acceptable to the City;
- (b) the Developer provides such preliminary documentation regarding the economic feasibility of the Development as the City may reasonably wish to receive during the term of this Agreement;
- (c) the completion of all undertakings required by this Agreement in a satisfactory and timely manner; and

- (d) the satisfaction of such other reasonable and customary conditions as are determined to be appropriate by either party.

Section 3. Developer's Undertakings. During the term of this Agreement the Developer shall do the following:

- (a) There are no businesses located on the Property, so no relocation plan is required.
- (b) Within 30 days after the date of this Agreement, the Developer shall do the following:
 - (i) Submit to the City a statement of the sources and uses and profit of all funding, including any City Participation which may be requested by the Developer, for the construction of the Development and a revised pro forma detailing all costs of the Development and including the income that is anticipated to be generated by the commercial portion of the Development. The pro forma shall be in such detail and form as would be acceptable to a lender being asked to provide mortgage financing for the Development. The Developer shall provide to the City such additional information as the City and its financial consultant may require to allow the City and its financial consultant to undertake a "but for" analysis for purposes of the Minnesota tax increment financing laws. The Developer understands that if the City is able to provide financial assistance for the Development, the preference is to provide such assistance on a "pay as you go" basis by which financial assistance would be made available as it is generated by the Development, and the City will not be obligated to make payments to the Developer if actual revenues received from the project are less than expected.
 - (ii) Submit to the City financial statements, in a form acceptable to the City, for Developer and Developer's owners.
- (c) Within 60 days after the date of this Agreement, the Developer shall do the following:
 - (i) submit to the City a proposed schedule for all phases of the Development, including without limitation, the timing of the closing on financing and the various stages of construction;
 - (ii) submit to the City a report by the Developer's engineer describing the nature and location of any public improvements that it will be necessary to construct as a result of the construction of the Development;
 - (iii) complete a concept review of the proposed Development by the City's Zoning and Planning Commission and City Council as required by the City Code;
 - (iv) hold an informational meeting, if Developer desires, with written notice being provided to all owners of property which is adjacent to the Property to discuss the Development and to hear and respond to such parties' concerns

and questions; and

- (v) submit to the City a formal development proposal including a narrative description of the proposed Development and specific information on the Developer's background and experience with similar redevelopment projects. Such proposal shall also include references including contact persons at other cities in which the Developer has completed projects.
 - (vi) submit to the City a letter from a financial institution stating a preliminary commitment to provide financing for the Development.
- (d) Every two weeks during the term of this Agreement, the Developer shall provide to the City written status reports on its activities under this Agreement and will attend, on a monthly basis or as otherwise requested, meetings of the City Council or HRA to discuss the Development.

All of the activities described above shall be performed at the sole expense of the Developer unless expressly stated otherwise.

Section 4. City's Undertakings. During the term of this Agreement, the City will undertake the following:

- (a) Utilizing the documentation and information submitted by the Developer pursuant to Section 3, the City will cause its fiscal and development consultant, Baker Tilly, to prepare a report for the City indicating:
 - (i) Whether any City Participation requested by the Developer in connection with the Development is appropriate;
 - (ii) Whether there is anticipated to be sufficient cash flow and tax increment from the Development to pay all of the costs associated with the Development;
 - (iii) Whether, based on analysis and review of market research conducted internally by the Developer, the Development is supported by market conditions; and
 - (iv) Indicating any other actions to be performed by the City or Developer in order to proceed with the Development.
- (b) The City and its consultants will undertake an analysis of whether the Property qualifies to be included in a redevelopment tax increment district. Such analysis will include the preparation of a building conditions analysis to determine whether there exists the requisite number of substandard buildings to qualify under state law to utilize Redevelopment TIF. Prior to the City undertaking such analysis, the

Developer shall deposit with the City an amount sufficient to reimburse the City for its costs of such analysis, pursuant to section 7 below. All buildings will be demolished by the City, at the expense of the City.

- (c) The City will analyze the information provided by the Developer pursuant to Section 3 to determine the feasibility of the Development and whether proceeding with the Development is, in the City's sole discretion, desirable. Within thirty days after the City is provided with the information required to be submitted by the Developer under Section 3, the City will notify the Developer if the City determines that it needs additional information, in which case the Developer shall have 30 days to supply such information. The City may, in its sole discretion, extend the time for the Developer to act under this paragraph.
- (d) To the extent necessary, coordinate with the HRA and any other agencies or authorities related to the compilation of the Property as well as exploring whether City Participation may be offered for the Development, knowing it is likely needed for the Development to move forward, based upon preliminary project estimates.
- (e) The City and HRA will prepare the Property for acquisition by bringing all parcels under common ownership of either the City or HRA with marketable title free from easements or restrictions that would preclude or delay the anticipated Development.
- (f) Within 60 days after the date of this Agreement the City shall secure and submit to the Developer a draft Purchase Agreement for the Development together with summaries of the specifics of the agreement including the proposed City Participation. Said Purchase Agreement or related development agreements will include recourse for non-performance of proposed projects.

Section 5. Negotiation of Purchase Agreement. If both parties have satisfied their obligations hereunder, and have each determined that they desire to move forward with the project, the City shall prepare a draft Purchase Agreement for negotiation between the parties. Nothing herein shall bind either party to approve a Purchase Agreement.

Section 6. Effect of Approvals. No approval given by the City hereunder or in connection herewith shall be deemed to constitute an approval of the Development for any purpose other than as stated herein and the process outlined in this Agreement shall not be deemed to supersede any concept review, conditional use permit, vacation, subdivision, or other zoning or planning approval process of the City relative to the development of real estate.

Section 7. City and Developer Costs. The cost of demolition and soil reports and/or soil corrections will be a City expense and Developer shall not be obligated to reimburse the City for such costs ("City's Costs"). The cost of the Developer's requirements in Section 3 including, without limitation, all fees incurred for legal review, engineering consultations, architect drawings, staff time and other consultants in relation to the proposed Development and its obligations under this Agreement shall be a Developer expense ("Developer's Costs").

Developer agrees that it will reimburse the City up to \$7,000.00 for all other reasonable out-of-pocket costs incurred by the City including, without limitation, all fees owed to the City's traffic, development, fiscal, legal, engineering, environmental and other consultants (the "Shared Costs") in relation to the City's obligations under Section 4 of this Agreement.

Upon entering into this Agreement, the Developer will deposit \$7,000.00 into escrow with the City and the City shall have the right to draw upon amounts in escrow to pay the Shared Costs. Every two weeks the City shall provide the Developer a ledger for the prior two weeks showing the withdrawals from escrow with invoices supporting each withdrawal. If this Agreement is terminated in accordance with the terms hereof, or it expires and the parties do not move forward with the Development, any sums remaining on deposit with the City, after the City pays or reimburses itself for all Shared Costs incurred to the date of termination, shall be returned to the Developer. The Developer's obligations under this Section 7 shall survive termination of this Agreement to the extent Shared Costs were incurred prior to the date of termination.

If the Developer fulfills its obligations under Section 3 by providing timely an economically feasible concept substantially similar to the proposed Development which meets current zoning and design guidelines for the Property and the City does not move forward with a Purchase Agreement with the Developer or does not approve the City Participation available and necessary to make the Development possible as part of the Purchase Agreement, the City shall reimburse the Developer for up to \$7,000.00 of certain costs related to the property (examples may include survey, soils, engineering, environmental, underground parking research, etc.) If the Developer seeks reimbursement for costs that exceed \$7,000.00 and up to \$15,000.00, it needs to be requested ahead of time and approved by the City Administrator. Any costs in excess of \$25,000 will need to be approved by the City Council. Within 30 days of the termination of this Agreement without the execution of a Purchase Agreement, the Developer shall submit to the City detailed invoices related to the property to support the Developer's Costs for reimbursement. The City shall reimburse the Developer within 30 days of receipt of such invoices up to the allowable and approved amount. The City's obligations under this Section shall survive termination of this Agreement to the extent the Developer's Costs were incurred prior to the date of termination or to the extent that costs are incurred to enforce the City's obligations under this Section.

Section 8. Modifications. This Agreement may be modified and the term hereof may be extended only through written amendments hereto signed by all parties to this Agreement.

Section 9. Term of Agreement; Exclusive Negotiations. This Agreement shall terminate ninety days after the date hereof or upon execution by the parties of the Purchase Agreement, whichever occurs first. If for any reason a Purchase Agreement has not been entered into by the parties within the term of this Agreement or any mutually approved extension thereof, this Agreement shall be null and void and, subject to Section 7, neither party shall have any liability or obligations to the other.

During the term of this Agreement, the City agrees that it will negotiate in good faith exclusively with the Developer concerning the development of the Property.

Section 10. Indemnification. The Developer agrees to indemnify, defend and hold harmless the City and its officers, employees, agents and representatives from and against any claims, demands, suits, costs, expenses (including reasonable attorneys' fees) actions or other proceedings whatsoever by any person or entity whatsoever arising or purportedly arising from the actions or inactions of the Developer (or if other persons acting on its behalf or under its direction or control) under this Agreement, or the transactions contemplated hereby or the acquisition, construction, installation, ownership, and operation of the Development; including, without limitation, any claim by a land owner or tenant located on the Property to be entitled to relocation costs and related expenses.

Section 11. Severability. If any portion of this Agreement is held invalid by a court of competent jurisdiction, such decision shall not affect the validity of any remaining portion of this Agreement.

Section 12. Notices. Notice, demand, or other communication from one party to the other shall be deemed effective if sent by certified mail, postage prepaid, return receipt requested or delivered personally to a party at its address in the first paragraph of this Agreement, or at such other address as such party may designate in writing to the other party.

IN WITNESS WHEREOF, the City has caused this Agreement to be duly executed in its name and behalf and the Developer has caused this Agreement to be duly executed in its name and behalf on or as of the date first above written.

**CITY
OF MARSHALL**

By _____
Its Mayor

By _____
Its City Administrator

APX CONSTRUCTION GROUP, LLC

By _____
Its _____

EXHIBIT A

Property Legal Description BLOCK 11 LOTS 1-5 AND BLOCK 11 LOTS 15-20

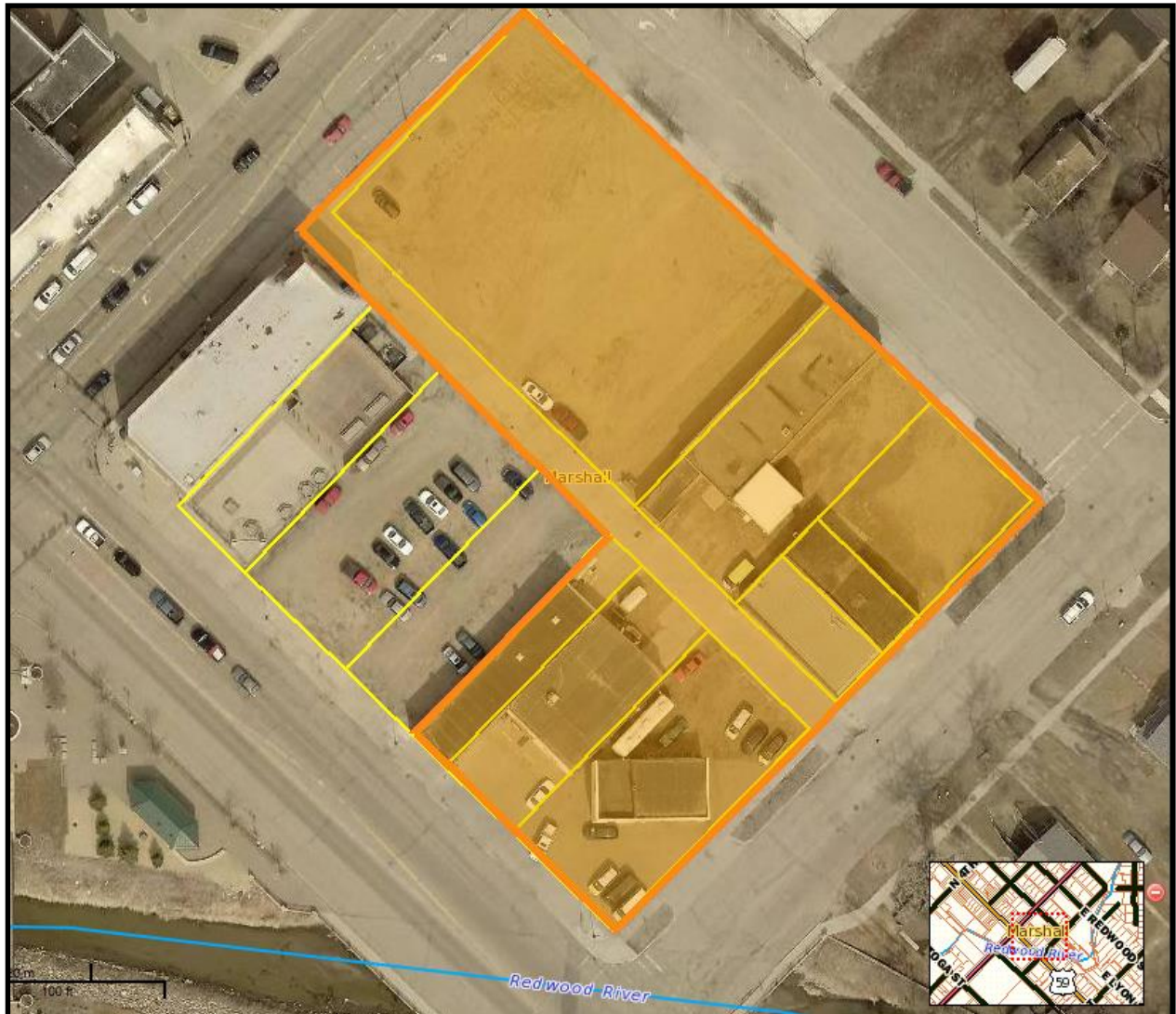


EXHIBIT B

Architectural Standards

Sections 86-276 through 86-293 under the common title of Central Heritage District Exterior Construction Standards.

https://library.municode.com/mn/marshall/codes/code_of_ordinances?nodeId=PTIICOOR_CH86ZO_ARTVISURE_DIV5CEHEDIEXCOST_S86-276DE