

**EXCLUSIVE NEGOTIATING AGREEMENT FOR  
6909 Ryan Drive**

This Exclusive Negotiating Agreement (this “Agreement”) by and between the City of Austin, a Texas home rule city and municipal corporation (the “City”) and 3423 Holdings, LLC (the “Developer”). The City and the Developer are collectively referred to as the “Parties” and individually as a “Party”.

In consideration of the mutual covenants and agreements contained herein, the City and the Developer agree as follows:

1. **Definitions.** As used in this Agreement, each of the following terms has the meaning given it in this Article or in the sections referred to below:

“Act” is the Texas Public Information Act, Chapter 552, Texas Government Code.

“Authorized Purposes” means conducting reasonably necessary inspections, tests, examinations, surveys, studies, and appraisals, as set out and limited in Section 11.

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

“City Property” means the Property and all other real and personal property, or property of any other kind or character, owned by the City.

“Claim” means all claims, demands, actions, damages, loss, liabilities, judgments, costs, and expenses, including without limitation, reasonable legal fees, and court costs, as set out in Section 15.

“Confidential Information” is any information submitted by the Developer during the negotiations carried out under this Agreement that is clearly marked "Privileged" or "Confidential" in accordance with 9.a.

“Desired Elements” are the elements identified in Section 3.c.

“Effective Date” means the date that both City and Developer have signed and executed this Agreement.

“Event of Default” are the events identified in Section 6.a.

“Mandatory Elements” are the elements identified in Section 3.b.

“MDA” means the Master Development Agreement to be negotiated by the City and the Developer which will set forth the terms and conditions for the redevelopment of the Property.

“MDA Master Plan” means the graphics, text, and tables illustrating the development of the Property, to be attached as an exhibit(s) to the MDA.

“Plans” are all documents, plans, studies, analyses, and similar documents regarding the planning, engineering, or infrastructure for the Property

“Property” means certain real property located in the City of Austin, Travis County, Texas, 6909 Ryan Drive, as more particularly described in the RFP.

“RFP” means the Request for Proposal 5500 SMW3010 issued by the City for the solicitation of Redevelopment of 6909 Ryan Drive, including all exhibits and addenda issued by the City.

“RFP Response” means the response to the RFP submitted by the Developer to the City on March 4, 2021, and all supplemental materials submitted by the Developer in response to addenda or clarification requests by the City, including Developer’s best and final offer.

“Right of Entry” means the right to enter the Property, as identified and limited in Section 11.

“Rules and Regulations” means all Federal, State, and City rules and regulations, including ordinances and resolutions, applicable to the redevelopment of the Property.

“Ryan Drive Working Group” means the group of community representatives who authored a report that expresses the community vision for redevelopment of the Property.

“Source of Income” means lawful, regular, and verifiable income including, but not limited to, housing vouchers and other subsidies provided by government and non-governmental entities, child support, or spousal maintenance, but does not include future gifts.

“Term” is the term of this Agreement, as defined in 2.a.

## 2. Negotiations.

a. Term. Unless sooner terminated as provided herein, the term of this Agreement will commence on the Effective Date and terminate on the date which is 9 months following the Effective Date (the “Term”). If, at the expiration of the Term, the Developer and the City have not agreed on the essential terms of the MDA, the Parties may further extend the Term for a successive three-month period upon mutual agreement. If, at the expiration of such extended Term, the Developer and the City have not agreed on the essential terms of the MDA, the City Manager of the City may further extend the Term for successive three-month periods upon written notice to the Developer. If the initial Term is extended, “Term” will mean the initial Term as it is so extended.

b. Good Faith Negotiations. The City and the Developer agree to negotiate diligently and in good faith throughout the Term with the goal of completing the tasks set forth in Article III and negotiating the MDA.

c. Exclusivity. During the Term, the City agrees not to negotiate with any other person or entity to act as a master developer of the Property or solicit bids or proposals to do so.

3. Roles and Responsibilities. During the Term, the City and the Developer shall negotiate and complete the following items:

a. Property.

i. The Parties shall negotiate the disposition of the Property that is necessary to facilitate its redevelopment in accordance with the RFP, the RFP Response, and the Rules and Regulations.

ii. The Developer shall produce analyses required for negotiation of the MDA, including without limitation: (1) Plans as defined and including site plans, architectural plans and renderings as necessary to evaluate and communicate physical and programmatic elements of the project; (2) financial pro formas reflecting sources and uses of funds for predevelopment, construction, and operation of the project; and (3) agreements among Development Team members regarding roles and responsibilities that the City may review.

iii. The City shall provide feedback regarding the Developer’s produced materials and shall make available in a timely manner qualified staff to contribute to discussions regarding, without limitation: affordable housing; design of buildings and open space; environmental conditions; finance; parks and recreation; transportation; and zoning.

iv. The City desires for the Developer to initiate, produce, and revise a conceptual site plan in connection with the preparation of the MDA. The site plan should depict exterior elevations and building design with sufficient detail to convey the overall architectural style of the proposed project on the Property, the commercial and residential spaces, and a parking plan for the Property for review and comment by the City in its capacity as the landowner. However, the site plan need not include the same level of detail that would be required under the

City's Land Development Code. The City shall review and comment on the site plan in its capacity as a landowner.

v. The Parties will further define the roles and responsibilities of the Developer and the City with respect to the completion of all due diligence regarding the Property.

b. Mandatory Elements. The Parties acknowledge that the Developer shall meet certain requirements in the MDA in accordance with applicable rules, regulations, directions, and parameters related to the Property including those contained in Resolution No. 20181101-024, the RFP, the RFP Response, and action taken by the City Council at the August 26, 2021 Austin City Council meeting (the "Mandatory Elements"). The Mandatory Elements shall, without limitation, include:

i. *Affordable Housing Development*. Developer shall provide a minimum of 344 units consistent with the RFP response, with 50% affordable for households earning at or below 60% MFI for rental units and 80% MFI for for-sale units and an emphasis on family-oriented multi-bedroom (2 and 3 bedrooms) housing.

ii. *WBE/MBE subcontracting goals*. Developer shall comply with City Code Chapter 2-9B and all other applicable codes, resolutions, rules, or ordinances.

iii. *City Requirements*: The Parties acknowledge and agree that certain City requirements regarding construction projects will apply, such as the minority-owned and women-owned business enterprise procurement program, construction of buildings, and Third-Party agreements, which include paying prevailing wage and ensuring worker safety and project sustainability.

iv. *Parkland*. Developer shall provide parkland, plaza, and open space on Property consistent with the RFP Response.

v. *Commercial Space*. Developer shall Provide commercial and community-serving space consistent with the RFP Response, including childcare center with subsidized/affordable spots for income-restricted working families.

vi. *Transit*. Developer shall:

1. Provide transit plaza across from the current Crestview station and pedestrian and bicycle access through the Property to the station consistent with the RFP Response; and
2. Coordinate transit plaza and access with the City and other Project Connect partners.

vii. *Public Comment and Community Outreach.* Developer will develop a community engagement plan, acceptable to the City, that includes timelines, deliverables, and strategies to maximize participation for various stakeholders including the Ryan Drive Working Group.

viii. *Payment.* Regardless of the real property rights transferred to Developer pursuant to the MDA, Developer shall make an upfront payment that will meet the minimum required payment in the RFP and state law to compensate Austin Energy for its initial property acquisition costs.

c. Desired Elements. The Parties shall, when negotiating the MDA, consider the following elements which are consistent with Resolution No. 20181101-024, the RFP, the RFP Response, and action taken by council at the August 26, 2021 Austin City Council meeting. If either the Developer or the City cannot or will not include one of these elements in the MDA, the Parties shall identify the reason(s) in writing for the City to provide to City Council:

i. *Affordable Housing Development.* In addition to the mandatory affordable housing elements contained in Section 3.b., Developer will use good faith efforts to investigate creative public and private methods to offer more affordable units at deeper levels of affordability and permanent supportive housing, particularly for families with children if possible, with voucher and case management support for continuum-of-care units from the City and/or other entities to be determined during negotiations.

ii. *Affordable Housing Management.* To the extent feasible, the City desires for the management of affordable housing to adhere to City requirements including:

1. Tenant protection provisions from the City's Rental Housing Development Assistance Program Guidelines (RHDA);
2. With respect to the townhomes included in the RFP Response, adhere to the City's Ownership Housing, Development Assistance Guidelines (OHDA);
3. Require covenants on the affordable housing units to reserve the units as affordable for not less than the term of the ground lease and/or grant the City a "Right of First Refusal" upon expiration of the affordability terms;

4. Provide for Source of Income protection by accepting housing choice vouchers from the HUD Housing Choice Voucher program under 24 CFR Part 982, the City's local housing vouchers, and other lawful, regular, and verifiable rental subsidies;
5. Limit rent charged (including utilities) in affordable rental units not to exceed 30% of a household's income at 60% MFI or 50% MFI income levels;
6. Adjust income restrictions (and rent restrictions) for household size under HUD guidelines;
7. Set sale price of affordable homes at no more than 3 times the household's annual income (or 3.5 times the household's income if someone in the household has completed approved homebuyer counseling or education); and
8. Subject ownership units to an equity cap in which the homeowner's equity can increase up to 2% per year for 30 years (at which point no additional equity can be earned).

iii. *Lease Terms.* The City desires the Developer to lease the Property through a fully capitalized ground lease with lump sum payment upfront or ground lease with ongoing payments, the terms for which will be negotiated and defined in the MDA and other partnership agreements with the City or related entities. Consideration for the lease and redevelopment of the Property shall consider profit-sharing for the City beyond a certain threshold once costs are recovered.

iv. *Parkland.* The Parties shall explore options during MDA negotiations for parkland dedication by deed, easement, or other instrument and work towards a long-term maintenance plan that establishes the role of the city, developer, and non-profit partners maintaining the park and amenities.

v. *Green Building:* The Parties shall explore options during MDA negotiations to strive to achieve the highest green building rating while achieving other community benefits.

d. Zoning and Subdivision. Any entitlement changes needed for the development of the Property will be negotiated as part of the MDA.

e. Public Comment and Outreach.

i. The Parties shall commit to community engagement events to allow public comment on the proposed conceptual site plan and MDA terms prior to City Council authorization of the MDA. This may include, but is not limited to, presentations to the City boards and commissions as well as posting relevant information on City websites. The Developer shall prepare conceptual site plans and other documents, at its sole costs and expense, as reasonably necessary for public comment and participate in public meetings as needed; and

ii. The Parties will develop a community engagement plan that includes clear timelines, deliverables, and examples of how the Developer will engage and maximize participation with existing communities and various stakeholders in relation to the redevelopment of the Property. The Parties will establish the method and responsibility for informing adjacent communities of construction activities throughout the redevelopment of the Property and, to the extent feasible, minimizing the impact of these activities on those communities as necessary.

f. Deposit. On the Effective Date, the Developer shall tender a non-refundable deposit to the City in the amount of \$15,000 (the “Deposit”). If a MDA is entered between the Parties, the Deposit will be applied to the initial payment of any consideration payable to the City under the MDA or any other documents executed pursuant thereto.

g. Documents.

i. Document Production. The City and its consultants shall initiate and produce each interim draft and final forms of the MDA. The Developer’s consultants will produce the MDA Master Plan, as well as those studies, cost estimates, infrastructure engineering, project proformas, and other development information reasonably necessary to support the MDA.

ii. Delivery of Documents; Ownership of Documents. The Developer shall provide the City with copies of all reports, studies, analyses, project proformas, and similar documents, prepared or commissioned by the Developer with respect to this Agreement and the Property, promptly upon their completion and after an internal review by the Developer. The City shall provide the Developer with copies of all reports, studies and analyses prepared or commissioned by the City with respect to this Agreement and the Property, promptly upon their completion and after an internal review by the City. Notwithstanding the provisions of this Section, in no event will any Party be required to disclose to any other Party information to the extent such information is protected by the attorney-client privilege. All documents, plans, studies, analyses and similar documents regarding the planning, engineering, or infrastructure, for the Property will be the sole property of the City subject to the rights of the consultants preparing same. All other plans prepared on behalf of the Developer shall be the property of the Developer or its consultants, as applicable.

4. **Basis for Negotiations.** The negotiations conducted under this Agreement, as well as the principal and initial basis for preparation of the MDA, will be based on Resolution No. 20181101-024, the RFP, the RFP Response, and action taken by Council at the August 26, 2021 Austin City Council meeting. It is expressly understood and stipulated that the development parameters set forth in the RFP Response have not been accepted, adopted, or approved by the City, nor have such parameters or any of them been approved or selected as a preferred alternative. It is expressly understood and stipulated that, except as contained in the RFP Response, the development parameters set forth in the RFP, Resolution No. 20181101-024, and action taken by Council at the August 26, 2021 Austin City Council meeting have not been accepted, adopted, or approved by the Developer, nor have such parameters or any of them been approved or selected as a preferred alternative. The Parties acknowledge and agree that the final development parameters for the Property shall be negotiated in good faith and agreed upon in the executed MDA approved by City Council and the governing body of the Developer.

5. **Expense Payment.** The Developer and the City shall each pay their respective costs incurred in connection with negotiation of and actions undertaken by the parties in furtherance of this Agreement.

6. **Events of Default and Remedies.**

a. **Event of Default.** Each of the following circumstances will constitute an “Event of Default” hereunder.

i. A breach of this Agreement (other than those listed in Section 6.a.ii. or 6.a.iii iii.) by either Party and such breach continues for a period of 30 days following written notice of such breach to the breaching Party, which notice must specify in reasonable detail the basis of such claim of breach.

ii. A breach by the Developer under Section 8 of this Agreement and such breach continues for a period of 10 business days following written notice of such breach to the Developer.

iii. Bankruptcy or insolvency of the Developer.

b. **Failure to Agree Upon the MDA.** Notwithstanding anything to the contrary in this Agreement, the failure to reach agreement upon the MDA will not be deemed an Event of Default by either Party. In the event the Term expires, and the Parties have failed to reach agreement upon the MDA, this Agreement will terminate and neither Party will have any further rights or obligations under this Agreement, except those rights or obligations which expressly survive termination pursuant to the terms of this Agreement.



c. Remedies.

i. In the event the Developer commits an Event of Default, the City may, as its sole and exclusive remedy, terminate this Agreement upon written notice to the Developer.

ii. In the event the City commits an Event of Default, the Developer may, as its sole and exclusive remedy, terminate this Agreement upon written notice to the City.

iii. In the event this Agreement is terminated pursuant to its terms, neither Party shall have any further rights or obligations under this Agreement, except those rights or obligations that expressly survive termination pursuant to its terms.

iv. Each Party expressly waives the right to recover damages from the other Party under this Agreement and neither Party may recover from the other actual, consequential, indirect, punitive, exemplary, special, or other damages of any kind or nature whatsoever.

7. **Right to Terminate.** Both the City and Developer have the right to terminate this Agreement at any time prior to the expiration of the Term upon written notice to the other Party.

8. **Assignment and Development Team.**

a. Assignment. The Developer shall not assign (it being agreed that for purposes of this Agreement, assignment includes, without limitation, a merger, dissolution, sale of stock or sale of assets, mortgage, pledge or otherwise transfer) its interests in this Agreement without the prior written consent of the City, which consent may be withheld in the City's sole and absolute discretion; provided, however that the Developer may assign its interests in this Agreement to an affiliate of the Developer or Developer's Development Team upon the City approval not to be unreasonably withheld. The City acknowledges that the entity that will enter into any MDA will involve the parties that currently comprise Developer and may also include other entities or individuals. The City also acknowledges that the entity that will enter into any MDA may enter into joint ventures, partnerships or other co-development arrangements with other entities and individuals. Developer acknowledges that the City must be assured that Developer and the entity that enters into the MDA as the "developer" have the financial and development capabilities to satisfy its obligations under the MDA, and if such entities do not have such capabilities, the City may require a guaranty or similar assurance of such obligations. The City may transfer its interest in this Agreement to a special entity or entities formed by the City to facilitate the development of the Property without the prior consent of the Developer but with written notice to the Developer of any such transfer.

b. Developer's Development Team. As provided in the RFP Response, the Developer's development team shall include (1) Michael Hsu Office of Architecture as the lead architect; (2) Campbell Landscape Architecture as the lead landscape architect; (3) O-SDA/Saigebrook and L&M Development Partners/MSquared for delivery of rental housing units; and (4) Austin Habitat for Humanity for delivery of ownership housing units. In the event of changes made at Developer's sole discretion in consultants or personnel, consultants or individuals

of substantially equivalent seniority, experience and qualifications will be assigned. The Developer shall provide written notice to the City of changes in its consultants and personnel and their respective responsibilities and shall furnish to the City information on the seniority, experience, and qualifications of any additional or substituted consultants or individuals.

9. **Confidentiality of Information and Negotiations.**

a. **Confidentiality.** The City and the Developer enter this Agreement with the understanding that, during the negotiation of the MDA, the City may require, and if so, then the Developer shall provide, information of a privileged and confidential nature relevant to the Property or the RFP Response (which shall not include financial, operational or trade secret information about other Developer projects) to the extent necessary for the City to verify financial, operational, or trade secret information that is relevant to the negotiations. The City agrees that it will, to the extent not prohibited by the Texas Public Information Act (“Act”), Chapter 552, Texas Government Code, keep confidential and not disclose any information submitted by the Developer in the course of the negotiations that is clearly marked “Privileged” or “Confidential” (“Confidential Information”) except for disclosures (a) in the process of discussions, meetings or conferences with its officers, agents, employees and representatives who reasonably need to know this information for purposes of evaluating, approving or effecting the transactions contemplated hereby and who are informed of this confidentiality requirement and who agree to be bound to it; (b) in response to a legal process or as otherwise required by law; or (c) in any manner to which the Developer consents in writing. The City shall use reasonable efforts to provide notice to the Developer of any disclosures to be made in response to a legal process or as otherwise required by law. Subject to any third-party rights under the Act, the City and the Developer agree that neither shall have the right to require the other to disclose attorney-client privileged communications or work product.

b. **Public Information Requests.** The City shall use reasonable efforts to provide prompt written notice to the Developer of any request received by the City pursuant to the Act requesting Confidential Information or information collected, assembled, or maintained for the City and to which the City has contractual access, for the purpose of providing the Developer an opportunity to seek to protect such information from disclosure. Under the Act, documents collected, assembled, or maintained for the City and to which the City has access under the terms of a contract may be deemed public information, subject to the exceptions in the Act. The City makes no representation as to how the Attorney General of Texas will rule on any public information request but agrees to reasonably cooperate with the Developer in asserting exemption claims under the Act, provided any extensive briefing or analysis of documentation will be the responsibility of the Developer.

c. **Press Releases and Public Communications.** The Parties acknowledge and agree that the proposed redevelopment of the Property is a matter of substantial interest to the community and will require regular, on-going communications by each Party, including responses to inquiries from officials of the City, members of community groups and neighborhood associations, and representatives of the media. The Parties agree to cooperate and coordinate in the responses to inquiries from media, elected and non-elected officials, and other members of the community. The Parties agree to coordinate press releases and other communications regarding the Property and

proposed redevelopment prior to publishing.

d. Survival. The terms of this Section shall survive the expiration or earlier termination of this Agreement but will be superseded by the terms of the MDA, if fully executed.

#### **10. Disposition, Outside Negotiations, and Existing Occupancies.**

a. Disposition. During the Term, the City shall not, without the written consent of the Developer (which consent will not be unreasonably withheld) (i) sell, lease, encumber or otherwise dispose of all or a portion of the Property in any manner which would affect Developer's right to develop the Property under the MDA, or (ii) except as specifically contemplated by this Agreement and the RFP, engage in any development activities, or construct any improvements on the Property.

b. Outside Negotiations. During the Term, Developer shall have the exclusive right to negotiate with third parties to facilitate the development of the Property in accordance with the MDA, provided that any letter of intent or agreement between the Developer and such third party shall contain the following disclaimer:

Notwithstanding anything to the contrary contained herein, (a) [Developer] is acting in its capacity as the proposed independent master developer for the [Property] and is not authorized to make any warranty, representation or covenant on behalf of the City of Austin or to bind the City of Austin to any agreement or other contract, and (b) the potential transaction mentioned herein is subject to the final negotiation and execution of certain agreements between [Developer] and the City of Austin, including without limitation, a master development plan and a master development agreement.

#### **11. Right of Entry and Insurance.**

a. Right of Entry. The City hereby grants the Developer, its employees, agents, and contractors, the right to enter the Property for the sole and limited purpose of conducting Authorized Purposes during the Term (the "Right of Entry"), subject to the following terms, conditions, and covenants:

i. Notice. The Developer must provide written notice to Jill Fagan, at [Jill.Fagan@austintexas.gov](mailto:Jill.Fagan@austintexas.gov), at least 24 hours prior notice to exercising its right of entry.

ii. Costs. All inspections, tests, examinations, surveys, and appraisals performed by the Developer on the Property shall be at the Developer's sole expense and in accordance with applicable laws.

iii. **Delivery of Insurance Certificates.** Neither Developer, nor a Developer agent or contractor, may enter the Property until certificates of insurance have been delivered to the City evidencing that the insurance coverages required by Section 11.b. have been obtained and are in force.

iv. **Repair of Damage.** If, for any reason, the Parties do not agree to the terms and provisions of the MDA, Developer shall repair any damage to the Property to the extent caused by Developer, or its agents, contractors, or employees, arising out of or concerning this Right of Entry, and restore the Property to substantially the same condition it was in prior to the occurrence of damage. If the Developer fails to commence to repair such damage within a reasonable time after written notice from the City and diligently pursue the restoration of the Property to completion, the City may perform such repair and restoration work, and the Developer agrees to compensate the City for the actual cost thereof plus a 10% charge for overhead expenses promptly after receipt of an invoice. Developer shall cause its agents and contractors to execute and deliver to the City such waivers of liability as the City may reasonably request as a condition to entry upon the Property. The provisions of this subsection will survive the expiration or earlier termination of this Agreement.

v. **Occupants.** In making any inspection or test hereunder, the Developer will use, and will cause any representative of the Developer to use, discretion so as not to unreasonably disturb the occupants of the Property.

b. **Insurance.** Developer, and its contractors, shall carry and maintain throughout the Term the insurance coverage set forth in the attached Exhibit "A".

12. **Real Estate Commissions.** The Developer represents that it has engaged no broker, agent, or finder in connection with this transaction, and the Developer agrees to indemnify and hold the City harmless from any claim by any broker, agent or finder retained by the Developer. The City represents that it has engaged no broker, agent, or finder in connection with this transaction and the City.

13. **Limitations of this Agreement.**

a. **Submission Not an Offer.** The submission of this Agreement by the City will not be construed as an offer. Until executed by the City and the Developer, the final terms and provisions are subject to revision.

b. No Disposition or Exchange. By executing this Agreement, neither the City nor the Developer is committing itself to or agreeing to undertake the: (a) exchange or transfer of land; (b) disposition of land to the Developer or the acquisition of land from the City; or (c) any other acts or activities requiring the subsequent independent exercise of discretion by, respectively, the City (or any agency or department of the City) or the Developer. This Agreement does not constitute a disposition or exchange of property by the City or the Developer. Execution of this Agreement by the City and the Developer is merely an agreement to enter into a period of exclusive negotiations according to these terms. If negotiations culminate in a MDA between the City and the Developer, such MDA shall become effective only upon the approval of the City Council and its execution by the City Manager pursuant to direction of the City Council and by the Developer and its governing body.

14. **The City's Right to Obtain Information and to Consult with Others.** The City reserves the right to obtain information concerning the transaction described by this Agreement from any person, entity, or group.

15. **Hold Harmless and Indemnity.**

a. Hold Harmless and Indemnity. DEVELOPER SHALL DEFEND, INDEMNIFY, AND HOLD HARMLESS CITY, ITS OFFICERS, APPOINTED OR ELECTED OFFICIALS, EMPLOYEES, AGENTS, REPRESENTATIVES, SUCCESSORS AND ASSIGNS (THE "INDEMNIFIED PARTIES"), AGAINST ALL COSTS, LIABILITIES, DAMAGES, CLAIMS, SUITS, ACTIONS, AND CAUSES OF ACTIONS ("CLAIMS"), BUT ONLY TO THE EXTENT ARISING, DIRECTLY OR INDIRECTLY, OUT OF (A) A BREACH OF THIS AGREEMENT OR VIOLATION OF LAW IN CONNECTION WITH THIS AGREEMENT BY DEVELOPER, ITS OFFICERS, AGENTS, EMPLOYEES, SUBCONTRACTORS, SUCCESSORS OR ASSIGNS, (THE "DEVELOPER PARTIES"), (B) A FALSE REPRESENTATION OR WARRANTY MADE BY THE DEVELOPER PARTIES IN CONNECTION WITH THIS AGREEMENT, (C) THE NEGLIGENCE, WILLFUL MISCONDUCT, OR BREACH OF A STANDARD OF STRICT LIABILITY BY THE DEVELOPER PARTIES IN CONNECTION WITH THIS AGREEMENT. CLAIMS TO BE INDEMNIFIED UNDER THIS ARTICLE INCLUDE CLAIMS FOR BODILY INJURY OR DEATH, OCCUPATIONAL ILLNESS OR DISEASE, LOSS OF SERVICES WAGES OR INCOME, DAMAGE, DESTRUCTION OR LOSS OF USE OF PROPERTY, AND WORKERS' COMPENSATION CLAIMS. DEVELOPER'S OBLIGATIONS UNDER THIS ARTICLE ARE NOT EXCUSED IN THE EVENT A CLAIM IS CAUSED IN PART BY THE ALLEGED NEGLIGENCE OR WILLFUL MISCONDUCT OF THE INDEMNIFIED PARTIES.

b. Hold Harmless and Indemnity Parameters. If the City notifies Developer of any Claims, Developer shall assume the Claims on behalf of the City and conduct with due diligence and in good faith the investigation and defense of the Claims and the response to it with counsel selected by Developer but reasonably satisfactory to the City; provided, that the City shall have the right to be represented by legal counsel of its own selection and at its own expense; and provided further, that if any such Claims involves both Developer and the City and the City shall have been advised in writing by legal counsel that there may be legal defenses available to it which are inconsistent with those available to Developer, then the City shall have the right to select

separate legal counsel to participate in the investigation and defense of and response to such Claims on its own behalf, and Developer shall pay or reimburse the City for all reasonable legal fees and costs incurred by the City because of the selection of such separate legal counsel. If any Claims arises as to which the indemnity provided for in this Section applies, and Developer fails to assume promptly (and in any event within 15 days after being notified of the Claims) the defense of the City, then the City may contest (or settle, with the prior written consent of Developer, which consent will not be unreasonably withheld, conditioned or delayed) the Claims at Developer's expense using legal counsel selected by the City; provided, that if any such failure by Developer continues for 30 days or more after Developer notified thereof, no such contest need be made by the City and settlement or full payment of any Claims may be made by the City without Developer's consent and without releasing Developer from any obligations to the City under this Section so long as, in the written opinion of legal counsel to the City, the settlement or payment in full is clearly advisable. So long as the Developer does not admit liability or agree to affirmative obligations on behalf of the City, the Developer is authorized to settle Claims.

c. City Indemnity Obligations. The City shall (a) provide prompt written notice to the Developer of any Claims, and (b) reasonably cooperate with the Developer in the investigation and defense of any Claims. In the event the City breaches its obligations contained in the previous sentence, the liability of Developer under this Section shall be reduced by the amount such breach directly caused a material impairment of the defense of the Claims and any time period affected by the City breach will be extended accordingly.

d. Survival. The provisions of this Section 15 will survive the expiration or earlier termination of this Agreement.

#### 16. General Terms and Conditions.

a. Notices. When this Agreement requires the Parties to provide notice to each other, the notice shall be in writing. Notices must be addressed, hand-delivered, or emailed only to the person designated for receipt of notice. A mailed notice shall be considered delivered three (3) business days after postmarked if sent by U.S. Postal Service Certified or Registered Mail, Return Receipt Requested, postage prepaid. Hand-delivered notices are considered delivered only when the addressee receives those notices. Notices delivered by e-mail are considered delivered three (3) business days after transmittal or when received by the addressee whichever is earlier. The Parties may make routine communications by first class mail, email, or other commercially accepted means. Notices and routine communications to the City and Developer shall be addressed as follows:

Developer

To: 3423 Holdings, LLC  
Attn: Benjamin Barlin  
Address: 4811 E 7<sup>th</sup> St, Austin, TX 78702  
Email: benbarlin@3423holdings.com

with a copy to:

To: Armbrust & Brown, PLLC  
Attn: Michael Whellan  
Address: 100 Congress Avenue, Suite 1300  
Austin, Texas 78701-2744

Email: mwhellan@abaustin.com

City of Austin

City of Austin  
City Manager’s Office  
Attn: City Manager  
Address: 301 W. Second Street  
Austin, Texas 78701

with a copy to:

City of Austin  
Economic Development Department  
Attn: Director  
Address: 301 W. Second Street  
Austin, Texas 78701  
Email: jill.fagan@austintexas.gov

with a copy to:

City of Austin  
Law Department  
Attn: Sean Creegan  
Address: 301 W. Second Street  
Austin, Texas 78701  
Email: sean.creegan@austintexas.gov

b. Nonliability of the City. THE DEVELOPER (A) AGREES THAT IT DOES NOT NOW, AND SHALL NOT AT ANY TIME WHETHER BEFORE OR AFTER EXECUTION OF THIS AGREEMENT, HAVE OR MAKE ANY CLAIM OR CLAIMS AGAINST THE CITY OR THE CITY PROPERTY, (B) AGREES THAT THE CITY DOES NOT HAVE ANY LIABILITY WHATSOEVER OF ANY KIND OR CHARACTER, DIRECTLY OR INDIRECTLY IN ACCORDANCE HEREWITH, AND (C) FURTHER EXPRESSLY AND ABSOLUTELY WAIVES ANY AND ALL CLAIMS AND CAUSES OF ACTION AGAINST THE CITY OR CITY PROPERTY, ARISING OUT OF OR CONCERNING THE RIGHT OF ENTRY, THE RFP, THE RFP RESPONSE, THIS AGREEMENT, OR THE NEGOTIATION OF THE MDA. IT IS THE INTENT OF THIS SECTION TO CONFIRM THAT THE DEVELOPER IS PROCEEDING AT ITS OWN RISK AND EXPENSE. As used in this Section, the term “Party” includes its respective members, officers, employees, agents, contractors, consultants, successors, and assigns. The provisions of this Section 16.b. will survive the expiration or early termination of this Agreement.

c. Non-Regulatory Capacity of the City. NOTWITHSTANDING ANYTHING TO THE CONTRARY CONTAINED IN THIS AGREEMENT, CITY IS EXECUTING THIS AGREEMENT SOLELY IN ITS CAPACITY AS THE OWNER OF THE PROPERTY AND NOT IN ITS CAPACITY AS A REGULATORY BODY (E.G., REGULATORY APPROVALS OR IN ANY OTHER REGULATORY CAPACITY). FURTHER, DEVELOPER SPECIFICALLY ACKNOWLEDGES THAT THE CITY CANNOT CONTRACT IN ANY MANNER REGARDING THE EXERCISE OF ITS SOVEREIGN POWERS.

d. Governing Law. This Agreement will be governed by and construed in accordance with the laws of the State of Texas.

e. Entire Agreement. This Agreement contains the entire agreement of the Parties regarding the negotiation of the MDA. This Agreement may be modified only by written agreement signed by the duly authorized representatives of the Parties hereto.

f. Captions. Captions at the beginning of each Article and Section of this Agreement are for reference only and will in no way define or interpret any provision hereof.

g. Construction. The provisions of this Agreement have been jointly drafted by the Parties and will be constructed as to the fair meaning and not for or against any Party based upon any attribution of such Party as the sole source of the language in question.

h. Counterparts; Electronic Transmission of Signatures. This Agreement may be executed in counterparts, each of which will be deemed an original but all of which together will constitute one and the same agreement. The use of electronically transmitted signatures, in place of original signatures on this Agreement is expressly allowed. The Parties intend to be bound by the signatures on such electronically transmitted document; are aware that the other Party will rely on the electronically transmitted signatures; and hereby waive any defenses to the enforcement of the terms of this Agreement based on the form of signature.

i. Successor and Assigns. This Agreement will be binding upon and inure to the benefit of the Parties named herein and their respective successors and permitted assigns, as long as the assignment was in accordance with Section 8.

j. Severability. If any provision of this Agreement or the application thereof to any person or circumstances becomes invalid or unenforceable to any extent, the application of such provision to other persons or circumstances and the remainder of this Agreement will not be affected thereby and will be enforced to the greatest extent permitted by law.

k. Relationship of Parties and No Third-Party Beneficiaries. This Agreement creates an independent contractor relationship of the Developer to the City. The City and the Developer are not partners or joint venturers, nor is either the principal or agent of the other, and nothing herein will be construed to create any such relationship between the Parties, or to render either Party liable for any obligations of the other. The only beneficiaries of this Agreement are the City and the Developer. There are no third-party beneficiaries.

l. Time of Essence. Time is of the essence with respect to the performance of each of the obligations and deadlines contained in this Agreement.



m. Attorneys' Fees. In consideration of the award and execution of this Agreement and in consideration of the City's waiver of its right to attorney's fees, the Developer knowingly and intentionally waives its right to attorney's fees under Section 271.153 of the Texas Local Government Code in any administrative proceeding, alternative dispute resolution proceeding, or litigation arising out of or connected to this Agreement. This section does not, in any way, impact the handling of attorneys' fees in the indemnification requirements of Section 15.

IN WITNESS WHEREOF, the Parties, who have had the opportunity to consult with their attorneys with respect hereto and who fully and completely understand the terms and provisions hereof, have executed this Agreement as of the date set forth below their signatures.

*Ben Barlin*

3423 HOLDINGS, LLC

Benjamin Barlin

Name

COO

Title

2/9/22

Date

CITY OF AUSTIN, a Texas home rule city and municipal corporation

*Rodney Gonzales*

Rodney Gonzales, Assistant City Manager

2/25/22

Date

APPROVE AS TO FORM

*Sean Creegan*

Sean Creegan

Assistant City Attorney

**Exhibit A**  
**Insurance Requirements**

1. Developer, and its contractors, as applicable, shall carry and maintain, or cause to be carried and maintained, throughout the Term the following insurance policies:
  - a. Workers' Compensation and Employers' Liability Insurance coverage with limits consistent with statutory benefits outlined in the Texas Workers' Compensation Act (Art. 401) and minimum policy limits for employers' liability of \$1,000,000 bodily injury for each accident, \$1,000,000 bodily injury by disease policy limit and \$1,000,000 bodily injury by disease each employee. The City will accept workers' compensation coverage written by the Texas Workers' Compensation Insurance Fund.
  - b. Automobile Liability Insurance for all owned, non-owned, and hired motor vehicles, which Developer, or its agents or contractors on Developer's behalf, will utilize to carry out the Authorized Purposes in a minimum amount of \$1,000,000, combined single limit.
  - c. Commercial General Liability policy with a minimum limit of \$1,000,000 per occurrence for bodily injury and/or property damage. The policy shall provide provisions for blanket contractual coverage and independent contractors coverage.
  - d. Professional Liability Insurance at a minimum limit of \$500,000 per claim, to pay on behalf of the assured all sums which the assured shall become legally obligated to pay as damages by reason of any negligent act, error, or omission arising out of the performance of professional services under this Agreement. If coverage is written on a claims-made basis, the retroactive data shall be prior to or coincident with the date of the Contract and coverage shall be continuous for 24 months following the completion of the contract. This requirement is only applicable if Developer (or its agent) or contractor is providing professional services under this Agreement.
2. Developer shall not cause any insurance to be canceled nor permit any insurance to lapse during the Term. Insurance coverage is to be written by companies duly authorized to do business in the State of Texas at the time the policies are issued and will be written by companies with an A. M. Best rating of B+VII or better or otherwise acceptable to the City. The policies will contain a provision in favor of the City waiving subrogation or other rights of recovery against the City. The City will be an additional insured as its interests may appear on the Commercial General and Automobile Liability policies.
3. All endorsements naming the City such as additional insured, waivers, and notices of cancellation endorsements as well as the certificate of insurance shall indicate: City of Austin, Economic Development Department, Attn: Director, P.O. Box 1088, Austin, Texas 78767.

4. Developer or its contractor, as applicable, shall be responsible for premiums, deductibles and self-insured retentions, if any, stated in policies. All deductibles or self-insured retentions shall be disclosed on the certificate of insurance attached. The insurance coverages required under this Agreement are required minimums and are not intended to limit the responsibility or liability of Developer.
  
5. For contractors who are providing professional services hereunder that are required to maintain Professional Liability Coverage, but who are not providing professional services as defined by Section 2254 of the Texas Government Code, including engineering, real estate appraising, accounting, architectural, or professional surveying services, Developer may determine, based on its professional business judgment and in the exercise of commercially sound risk management practices, that the scope of a particular contractor's work involves a lower level of risk and, accordingly, require that contractor to maintain a lower amount of Professional Liability Coverage.