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CITY SECRETARY

**REINVESTMENT ZONE NUMBER ONE, CITY OF MCKINNEY
THE CITY OF MCKINNEY, TEXAS
AND
BRADLEY S. KIDWELL FAMILY LP
CHAPTER 380 ECONOMIC DEVELOPMENT AND PROJECT PLAN
IMPLEMENTATION AGREEMENT**

WHEREAS, *BRADLEY S. KIDWELL FAMILY LP*, a Texas family limited partnership (hereinafter "FLOUR MILL"), is entering into this Chapter 380 Economic Development and Project Plan Implementation Agreement (this "Agreement") pursuant to a program initiated by ***REINVESTMENT ZONE NUMBER ONE, CITY OF MCKINNEY*** (hereinafter "TIRZ") pursuant to Section 311.010(h) of the Texas Tax Code and Chapter 380 of the Texas Local Government Code, for the primary purpose of constructing, renovating and operating a mixed use historic Project known as the Historic Flour Mill (the "Project") located wholly within Reinvestment Zone Number One in the "Town Center" area of the TIRZ of McKinney, Texas; and

WHEREAS, the TIRZ has agreed to an economic development grant to FLOUR MILL based on the timely satisfaction of the conditions contained in a related North Central Texas Council of Governments ("NCTCOG") grant and upon the timely completion of the Project, including but not limited to certain public infrastructure funded by the McKinney Community Development Corporation to FLOUR MILL which public infrastructure is necessary to provide adequate access to the Project; and

WHEREAS, the TIRZ has the authority under Section 311.010(h) and Chapter 380 of the Texas Local Government Code to make loans or grants of TIRZ funds for the purposes of promoting local economic development and stimulating business and commercial activity within the TIRZ; and

WHEREAS, the TIRZ has established the Project as an eligible project under the TIRZ Project Plan as required by law and determines that a conditional grant to FLOUR MILL of its funds will serve the public purpose of promoting local economic development and enhancing business and commercial activity in the TIRZ and the City of McKinney, Texas; and

WHEREAS, the TIRZ has concluded and hereby finds that this Agreement clearly promotes economic development in the TIRZ and, as such, meets the requisites under Section 311.101(h) and Chapter 380 of the Texas Local Government Code and further, is in the best interests of the TIRZ, FLOUR MILL and the City of McKinney, Texas; and

WHEREAS, the City Council has considered and approved this Agreement authorizing the TIRZ pursuant to applicable law; and

WHEREAS, the City of McKinney, Texas ("CITY") desires to participate in an economic development project and program under Chapter 380 of the Texas Local Government Code, for the primary purpose of constructing, renovating and operating a mixed use historic Project known as the Historic Flour Mill to enhance businesses and job growth in the Town Center area of the city.

NOW, THEREFORE, for and in consideration of the agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, TIRZ, FLOUR MILL and CITY agree as follows:

SECTION 1. TERM

This Agreement shall be effective from the Effective Date until December 31, 2013, unless terminated sooner under the provisions herein.

SECTION 2. DEFINITIONS

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

- a. Agreement. The word "Agreement" means this Chapter 380 Economic Development and Project Plan Implementation Agreement, together with all exhibits and schedules attached to this Agreement from time to time, if any.
- b. CITY. The word "CITY" means the City of McKinney, Texas. For purposes of this Agreement, TIRZ's address is 222 N. Tennessee, McKinney, Texas 75069.
- c. FLOUR MILL. The words "FLOUR MILL" mean the Bradley S. Kidwell Family LP, a Texas family limited partnership, including its successors and assigns.
- d. Grant. The word "Grant" means a payment to FLOUR MILL under the terms of this Agreement.
- e. Grant Submittal Package. The words "Grant Submittal Package" mean the documentation required to be supplied to TIRZ as a condition of receipt of any Grant.
- f. MCDC Incentive. The words "MCDC Incentive" mean the related incentive agreement(s) by and between the McKinney Community Development Corporation and FLOUR MILL dated effective August 24, 2011, a copy of which is attached hereto as *Exhibit A*, relating to the Project.

- g. NCTCOG Grant. The words "NCTCOG Grant" mean the related grant funding agreement(s) for \$1,760,000 by and between the City of McKinney, Texas, the North Central Texas Council of Governments, and the State of Texas, a copy of which is attached hereto as **Exhibit B**, dated effective August 24, 2011 for construction and renovation of the FLOUR MILL and related public infrastructure in McKinney, Texas.
- h. Project. The word "Project" means the Historic Flour Mill, including the required NCTCOG Grant and MCDC infrastructure improvement, located generally at 415 E. Louisiana Street, McKinney, TX, 75069.
- i. TIRZ. The letters "TIRZ" means Reinvestment Zone Number One, City of McKinney. For purposes of this Agreement, TIRZ's address is 222 N. Tennessee, McKinney, Texas 75069.

SECTION 3. GRANT FUNDING OBLIGATION OF TIRZ / IMPACT FEE AND PARK DEDICATION FEE WAIVER BY CITY

During the term of this Agreement, TIRZ shall fund a one-time grant in the amount equal to Two Hundred Thousand and No/100 Dollars (\$200,000.00) payable upon the satisfaction of the express terms and conditions described in Section 4 below. Subject to FLOUR MILL's continuous satisfaction of Section 4 below, the TIRZ agrees to process the Grant within thirty (30) days after receipt of FLOUR MILL's Grant Submittal Package. Notwithstanding the foregoing, the Grant shall not be funded until 1) the FLOUR MILL satisfies all applicable obligations of the NCTCOG Grant and 2) the TIRZ has sufficient funds in the TIRZ Fund to satisfy the entire Grant. So long as no default exists at the time that FLOUR MILL is required to pay applicable roadway, sewer and water impact fees and park dedication fees, CITY agrees to waive all of said fees for the Project.

SECTION 4. OBLIGATIONS OF FLOUR MILL

While this Agreement is in effect, FLOUR MILL shall comply with the following terms and conditions to be eligible for any Grant; as such conditions are described or may apply:

- a. FLOUR MILL shall fund and complete construction of all private development phases, including but not limited to Phase 2(a), Phase 2(b), and Phase 3(a) of the Project (as specifically interlineated on **Exhibit C** attached hereto and made a part hereof) and satisfy all conditions of the private developer (as specifically interlineated on **Exhibit B** attached hereto and made a part hereof) and further as described in the NCTCOG Grant on or before March 1, 2013. In addition, FLOUR MILL shall satisfy all conditions contained in the MCDC Incentive on or

before December 31, 2013, as such are more particularly described in *Exhibit A* attached hereto and made a part hereof.

- b. FLOUR MILL shall submit a Grant Submittal Package to the TIRZ staff consisting of (i) the "as built" plans for the private developer-constructed improvements (Phase 2(a), Phase 2(b), and Phase 3(a)) required under *Exhibit A* and *Exhibit B*, (ii) all other submittals required by the NCTCOG Grant and the MCDC Incentive, and (iii) all cost and payment documentation for the private developer-constructed improvements. The TIRZ staff, or its designee, shall verify that the expenditures were made in such amounts prior to any Grant disbursement.
- c. FLOUR MILL shall convey to CITY, at no cost to CITY and upon CITY's written request, a triangular-shaped parcel of land on the south side of the Project, containing approximately 2,185 sf, and any additional strips of land owned by FLOUR MILL to allow CITY to make any required infrastructure improvements described in the NCTCOG grant. FLOUR MILL shall make any conveyances under this paragraph free and clear of all encumbrances, save and except those to which CITY may consent in writing.
- d. FLOUR MILL shall be in compliance with all terms and conditions of the NCTCOG Grant and the MCDC Incentive throughout the term of this Agreement, including but not limited to, compliance with all applicable City of McKinney codes, state and federal laws, and local ordinances applicable to the Project.
- e. So long as FLOUR MILL shall remain in continuous compliance with the terms of this Agreement, the NCTCOG Grant and the MCDC Incentive, the Project's satisfaction of the 50% on-site parking requirement for non-residential uses shall be determined by a count of those public parking spaces located within five hundred (500') feet of the Project's property line.

SECTION 5. EVENTS OF DEFAULT.

Each of the following shall constitute an event of default under this Agreement:

- a. TIRZ's failure to process any Grant payment to FLOUR MILL in accordance with Section 3 of this Agreement.
- b. FLOUR MILL's violation or failure to perform any of the covenants contained in Section 4 hereinabove.
- c. CITY's failure to grant the waiver of impact fees and park dedication fees contained in Section 3 of this Agreement.

SECTION 6. EFFECT OF AN EVENT OF DEFAULT

In the event of default under Section 5, 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 and the non-defaulting party is not otherwise in default, the non-defaulting party shall have the right to immediately terminate this Agreement.

As long as it shall not be in default, FLOUR MILL shall further have the power to enforce specific performance to collect amounts owing upon TIRZ's default without terminating this Agreement. No action shall lie for punitive damages, and no special or consequential damages shall be recovered by either party. FLOUR MILL shall be entitled to receive from TIRZ any Grants due FLOUR MILL through the date of termination.

If TIRZ or CITY exercises its rights to terminate the Agreement, FLOUR MILL shall not be entitled to any Grant payments hereunder and CITY shall thereafter have its rights under Section 7 relative to the Project.

SECTION 7. OPTION TO PURCHASE PROJECT UPON TERMINATION BY CITY OR TIRZ

FLOUR MILL hereby grants to CITY (assignable by City to TIRZ) an option to purchase all property comprising the Project, both land and improvements, (the "Option") for a price equal to the then Fair Market Value (defined below) by giving written notice to FLOUR MILL of CITY's election to exercise the Option on or before the date that is 90 days after the date of Termination under Paragraph 6 above (the "Option Period"). Upon the exercise of this Option by CITY, a closing will take place within ninety (90) days thereof at a title company to be selected by the parties. FLOUR MILL will not convey or enter an agreement to convey the Property to any party other than CITY during the Option Period.

For purposes of this section, "Fair Market Value" shall mean an amount to be agreed to by FLOUR MILL and CITY. If, however, if FLOUR MILL and CITY cannot agree on the Fair Market Value within thirty (30) days after CITY exercises the Option, then the Fair Market Value shall be determined by appraisal. The appraisal shall be made with each of FLOUR MILL and CITY choosing one appraiser who is a licensed real estate broker or agent, with such two appraisers picking a third appraiser (the "Deciding Appraiser"). FLOUR MILL's appraiser and CITY's appraiser shall each submit a fair market value to the Deciding Appraiser, and the Deciding Appraiser shall select either the fair market value determined by FLOUR MILL's appraiser or CITY's appraiser and the Deciding Appraiser's decision shall control and govern and be the purchase price for the sale of the Property from FLOUR MILL to CITY. FLOUR MILL and CITY shall pay for their respective appraisers and shall share equally the cost of the Deciding Appraiser.

SECTION 8. MISCELLANEOUS PROVISIONS

The following miscellaneous provisions are a part of this Agreement:

- a. **Amendments.** This Agreement 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 all of the parties hereto.
- 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 Collin County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of Collin County, Texas.
- c. **Binding Obligation Only on Effective Date.** This Agreement shall become a binding obligation on the parties on the Effective Date. TIRZ warrants and represents that the individual executing this Agreement on behalf of TIRZ has full authority to execute this Agreement and bind TIRZ to the same. FLOUR MILL 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. CITY warrants and represents that the individual executing this Agreement on behalf of CITY has full authority to execute this Agreement and bind CITY to the same.
- d. **No Waiver of Sovereign Immunity.** No party hereto waives any statutory or common law right to sovereign immunity by virtue of its execution hereof.
- e. **Execution of Agreement.** The TIRZ has authorized its Chairman to execute this Agreement on behalf of TIRZ. The CITY has authorized its City Manager to execute this Agreement on behalf of the CITY.
- f. **Severability.** In the event any provision of this Agreement shall be determined by any court of competent jurisdiction to be invalid or unenforceable, the Agreement shall, to the extent reasonably possible, remain in force as to the balance of its provisions as if such invalid provision were not a part hereof.
- g. **Notices.** All notices required to be given under this Agreement shall be given in writing and shall be effective when actually delivered or when deposited in the United States mail, first class, postage prepaid, addressed to the party to whom the notice is to be given at the addresses shown above. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's

address. For notice purposes, each party agrees to keep the other informed at all times of its current address.

- h. **Effective Date.** The effective date (the "Effective Date") of this Agreement shall be the date on which NCTCOG grant is fully executed. If full execution is not obtained by August 31, 2011, this Agreement shall be null and void.
- j. **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.

BRADLEY S. KIDWELL FAMILY LP
a Texas family limited partnership

By: _____




Date Signed: _____

9/15/11

REINVESTMENT ZONE NUMBER ONE, CITY OF MCKINNEY

By: _____



Name: _____

DON DAY

Title: _____

CHAIRMAN

Date Signed: _____

9-20-11

ATTEST:

Sandy Hart 9/20/11

TIRZ Secretary

APPROVED AS TO FORM:

[Signature]

MARK S. HOUSER

Attorney for Reinvestment Zone Number One, City of McKinney

CITY OF MCKINNEY, TEXAS

By:

Name:

[Signature]
JASON GRAY

Title:

CITY MANAGER

Date Signed:

ATTEST:

[Signature] 9/20/11

SANDY HART, TRMC, MMC
City Secretary



By Rick Chaffin, Deputy City Manager
and authorized signatory

PREPARED IN THE OFFICES OF:

BROWN & HOFMEISTER, L.L.P.
740 E. Campbell Road, Suite 800
Richardson, Texas 75081
214/747-6100
214/747-6111 Fax

PERFORMANCE AGREEMENT

Developer: ***BRADLEY S. KIDWELL FAMILY, L.P.***
407 E. Louisiana Street
McKinney, Texas 75069

MCDC: ***McKINNEY COMMUNITY DEVELOPMENT CORPORATION***
321 N. Central Expressway, Suite 240
McKinney, Texas 75070

This **PERFORMANCE AGREEMENT** between the ***BRADLEYS. KIDWELL FAMILY, L.P.***, a Texas family limited partnership (hereinafter referred to as the "Developer"), and the ***McKINNEY COMMUNITY DEVELOPMENT CORPORATION***, a Texas non-profit corporation (hereinafter referred to as the "MCDC"), is made and executed on the following recitals, terms and conditions.

WHEREAS, Developer submitted an application to the MCDC seeking assistance concerning the constructing, renovating, and operating a mixed use historic development known as the Historic Flour Mill generally located at 415 E. Louisiana Street, McKinney, Texas (hereinafter referred to as the "Project"); and

WHEREAS, the MCDC Board of Directors considered Developer's application at its meeting held on April 28, 2011, at which time the MCDC Board of Directors agreed to acquire an approximately 20,450 square foot tract or tracts of land intended for the construction of an approximately 50 parking space public parking lot (hereinafter referred to as the "Parking Lot") for the benefit of the Project; and

WHEREAS, the MCDC Board of Directors approved an expenditure of funds, not to exceed \$225,000, for the construction of the Parking Lot at its meeting held on June 23, 2011, and

WHEREAS, the McKinney City Council approved the action taken by the MCDC Board of Directors at its meeting held on June 19, 2011, and

WHEREAS, the MCDC Board of Directors has determined the acquisition of real property and the construction of the Parking Lot for the benefit of the Project is consistent and meets the definition of "project" as that term is defined in Section 505.152 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.

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 MCDC and the 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, and shall continue thereafter until all obligations of Developer to MCDC have been performed in full, or on **December 31, 2013**, unless terminated sooner under the provisions herein.

SECTION 3. DEFINITIONS.

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

- (a) **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.
- (b) **City.** The word "City" means the City of McKinney, Texas, a Texas home-rule municipality, and whose address for the purposes of this Agreement is 222 N. Tennessee, McKinney, Texas 75069.
- (c) **Developer.** The word "Developer" means the Bradley S. Kidwell Family, L.P., a Texas family limited partnership, its successors and assigns, and whose address for the purposes of this Agreement is 407 E. Louisiana Street, McKinney, Texas 75069.
- (d) **Effective Date.** The words "Effective Date" mean the date of the later to execute this Agreement by Developer and MCDC.
- (e) **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."
- (f) **MCDC.** The word "MCDC" means the McKinney Community Development Corporation, a Type B economic development corporation, and a Texas non-profit corporation, its successors and assigns, and whose address for the purposes of this Agreement is 321 N. Central Expressway, Suite 240, McKinney, Texas 75070.
- (g) **NCTCOG Grant.** The words "NCTCOG Grant" mean the related grant funding agreement(s) for \$1,760,000.00 by and between the City of McKinney, Texas, the North Central Texas Council of Governments ("NCTCOG"), and the State of Texas, a copy of which is attached hereto as *Exhibit B*, dated effective August 24, 2011, for the construction and renovation of the Project, and related public infrastructure in the City of McKinney, Texas.

- (h) **Parking Lot.** The words "Parking Lot" mean the approximately 50 parking space public parking lot constructed on an approximately 20,450 square foot tract or tracts of land as depicted in *Exhibit C* of this Agreement, which is attached hereto and incorporated herein for all purposes.
- (i) **Project.** The word "Project" means the Historic Flour Mill, including the required NCTCOG Grant and MCDC infrastructure improvements, generally located at 415 E. Louisiana Street, McKinney, Texas 75069.
- (j) **TIRZ Incentive.** The words "TIRZ Incentive" mean the related Chapter 380 Economic Development and Project Plan Implementation Agreement by and between the Reinvestment Zone Number One, City of McKinney, Texas, and the Developer, dated effective August 24, 2011, a copy of which is attached hereto as *Exhibit A*, relating to the Project.

SECTION 4. AFFIRMATIVE COVENANTS.

The parties covenant and agree that while this Agreement is in effect, the parties shall comply with the following terms and conditions:

- (a) Developer shall fund and complete construction of all private development phases, including but not limited to Phase 2(a), Phase 2(b), and Phase 3(a) of the Project (as specifically interlined on *Exhibit D* attached hereto and made a part hereof) and satisfy all conditions of the private developer (as specifically interlined on *Exhibit B* attached hereto and made a part hereof) and further as described in the NCTCOG Grant on or before March 1, 2013. In addition, Developer shall satisfy all conditions contained in the TIRZ Incentive on or before December 31, 2013, as such are more particularly described in *Exhibit A* attached hereto and made a part hereof.
- (b) Developer shall convey to the City of McKinney, Texas, at no cost to City, and upon City's written request, a triangular-shaped parcel of land on the south side of the Project, containing approximately 2,185 square feet, and any additional strips of land owned by Developer to allow MCDC to construct the Parking Lot and to allow City to make any required infrastructure improvements described in the NCTCOG Grant. Developer shall make any conveyances under this paragraph free and clear of all encumbrances, save and except those to which the City may consent in writing.
- (c) Developer shall be in compliance with all terms and conditions of the NCTCOG Grant and the TIRZ Incentive throughout the Term of this Agreement, including but not limited to, compliance with all applicable City of McKinney codes, state and federal laws, and local ordinances applicable to the Project.
- (d) So long as Developer shall remain in continuous compliance with the terms of this Agreement, the NCTCOG Grant, and the TIRZ Incentive, the Project's satisfaction of the fifty percent (50%) on-site parking requirement for non-residential uses shall be determined

by a count of those public parking spaces located within five hundred feet (500') of the Project's property line.

- (e) MCDC covenants and agrees to acquire the approximately 20,450 square feet of land for the Parking Lot by September 7, 2011. Further, MCDC covenants and agrees to construct or cause to be constructed an approximately 50 space Parking Lot within one-hundred twenty (120) days after acquisition by MCDC. MCDC agrees to allow Developer the exclusive use of 35 spaces for a period of ten (10) years from the date that the Parking Lot is opened for public use.
- (f) Developer agrees to make, execute and deliver to MCDC such other promissory notes, instruments, documents and other agreements as MCDC or its attorneys may reasonably request to evidence this Agreement.
- (g) 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 MCDC.

SECTION 5. EVENTS OF DEFAULT.

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

- (a) **Affirmative Covenants of Developer.** Failure of Developer to perform any of the affirmative covenants contained in Section 4 of this Agreement shall be Event of Default.
- (b) **Affirmative Covenants of MCDC.** Failure of MCDC to perform any of the affirmative covenants contained in Section 4 of this Agreement shall be Event of Default.
- (c) **False Statements.** Any warranty, representation, or statement made or furnished to MCDC by or on behalf of Developer under this Agreement or the related documents that is false or misleading in any material respect, either now or at the time made or furnished.
- (d) **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.
- (e) **Other Defaults.** Failure of Developer to comply with or to perform any other term, obligation, covenant or condition contained in this Agreement or in any of the related documents, or failure of Developer to comply with or to perform any other term, obligation, covenant or condition contained in any other agreement between MCDC and Developer.

SECTION 6. EFFECT OF AN EVENT OF DEFAULT.

In the event of default under Section 5 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 Developer covenants to forfeit the exclusive use for any purpose the 35 spaces in the Parking Lot.

SECTION 7. INDEMNIFICATION.

Developer shall indemnify, save, and hold harmless MCDC, its directors, officers, agents, attorneys, and employees (collectively, the "Indemnitees") from and against: (i) any and all claims, demands, actions or causes of action that are asserted against any Indemnitee if the claim, demand, action or cause of action directly or indirectly relates to tortious interference with contract or business interference, or wrongful or negligent use of MCDC's loan advances by Developer or its agents and employees; (ii) any administrative or investigative proceeding by any governmental authority directly or indirectly related, to a claim, demand, action or cause of action in which MCDC is a disinterested party; (iii) any claim, demand, action or cause of action which directly or indirectly contests or challenges the legal authority of MCDC or Developer to enter into this Agreement; and (iv) any and all liabilities, losses, costs, or expenses (including reasonable attorneys' fees and disbursements) that any Indemnitee suffers or incurs as a result of any of the foregoing; provided, however, that Developer shall have no obligation under this Section to MCDC with respect to any of the foregoing arising out of the gross negligence or willful misconduct of MCDC or the breach by MCDC of this Agreement. If any claim, demand, action or cause of action is asserted against any Indemnitee, such Indemnitee shall promptly notify Developer, but the failure to so promptly notify Developer shall not affect Developer's obligations under this Section unless such failure materially prejudices Developer's right to participate in the contest of such claim, demand, action or cause of action, as hereinafter provided. If requested by Developer in writing, as so long as no Default or Event of Default shall have occurred and be continuing, such Indemnitee shall in good faith contest the validity, applicability and amount of such claim, demand, action or cause of action and shall permit Developer to participate in such contest. Any Indemnitee that proposes to settle or compromise any claim, demand, action, cause of action or proceeding for which Developer may be liable for payment of indemnity hereunder shall give Developer written notice of the terms of such proposed settlement or compromise reasonably in advance of settling or compromising such claim or proceeding and shall obtain Developer's concurrence thereto.

SECTION 8. DEVELOPER'S REPRESENTATIONS.

By execution hereof, the signators warrant and represent that they have the requisite authority to execute this Agreement and the related documents and that the representations made herein, and in the related documents, are true and accurate in all respects.

SECTION 9. 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 Collin County, Texas. Venue for any action arising under this Agreement shall lie in the state district courts of Collin 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. MCDC 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.** All notices required to be given under this Agreement shall be given in writing and shall be effective when actually delivered or when deposited in the United States mail, first class, postage prepaid, addressed to the party to whom the notice is to be given at the address shown on Page 1 of this Agreement. Any party may change its address for notices under this Agreement by giving formal written notice to the other parties, specifying that the purpose of the notice is to change the party's address. For notice purposes, Developer agrees to keep MCDC informed at all times of Developer's current address.
- (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.

[The Remainder of this Page Intentionally Left Blank]

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

DEVELOPER:

BRADLEY S. KIDWELL FAMILY, L.P.,
a Texas family limited partnership,

By: *Brad Kidwell*
Name: *Brad Kidwell*
Title: *Managing Partner*
Date Signed: *9/15/11*

MCDC:

McKINNEY COMMUNITY
DEVELOPMENT CORPORATION,
a Texas non-profit corporation,

By: *Tracy Rater*
TRACY RATER
Chairperson *9-16-11*
Date Signed: _____

PREPARED IN THE OFFICES OF:

BROWN & HOFMEISTER, L.L.P.
740 E. Campbell Road, Suite 800
Richardson, Texas 75081
214/747-6100
214/747-6111 Fax

CSJ: 0918-24-181
 Project Name: Historic Flour Mill Catalyst TOD
Sustainable Development Project
 District #18-Dallas
 Code Chart 64# 00200
 Funding Category: RTR (SH 121 Subaccount Funds)

**FUNDING AGREEMENT
 FOR PROJECTS USING FUNDS HELD IN THE
 STATE HIGHWAY 121 SUBACCOUNT-
 SUSTAINABLE DEVELOPMENT INFRASTRUCTURE
 Off-System Projects**

This Funding Agreement, hereinafter referred to as the "Agreement", is made and entered into by and between the State of Texas, hereinafter referred to as the "STATE", the City of McKinney, hereinafter referred to as the "LOCAL GOVERNMENT", and the North Central Texas Council of Governments, hereinafter referred to as "NCTCOG". The STATE, LOCAL GOVERNMENT, and NCTCOG may each be referred to as a "Party", and may be collectively referred to as "Parties" to this Agreement.

WITNESSETH

WHEREAS, the STATE has received money from the North Texas Tollway Authority for the right to develop, finance, design, construct, operate, and maintain the SH 121 toll project from Business SH 121 in Denton County to US 75 in Collin County; and,

WHEREAS, pursuant to Transportation Code, 228.006 the STATE shall authorize the use of surplus revenue of a toll project for a transportation project, highway project, or air quality project within the district of the Texas Department of Transportation in which any part of the toll project is located; pursuant to Transportation Code §228.012 the STATE has created a separate subaccount in the state highway fund to hold such money (SH 121 Subaccount), and the STATE shall hold such money in trust for the benefit of the region in which a project is located, and may assign the responsibility for allocating money in the subaccount to a metropolitan planning organization; and,

WHEREAS, in Minute Order 110727, dated October 26, 2006, the Texas Department of Transportation Commission (the "Commission") approved a memorandum of understanding (MOU) with the Regional Transportation Council concerning in part the administration, sharing, and use of surplus toll revenue in the region; under the MOU the RTC shall select projects to be financed using surplus revenue from a toll project, subject to Commission concurrence; and,

WHEREAS, on June 3, 2010 the Regional Transportation Council (RTC) approved staff recommendations for selected projects for implementation of the Sustainable Development Program in the Dallas-Fort Worth Metropolitan Area for the implementation of transportation improvements related to sustainable development projects and local sustainable development planning programs; and,

WHEREAS, in Minute Order 112603, dated February 24, 2011, the Commission concurred with RTC's selection of projects for the Sustainable Development Program; and,

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WHEREAS, the North Central Texas Council of Governments (NCTCOG) has been designated as the Metropolitan Planning Organization for the Dallas-Fort Worth Metropolitan Area by the Governor of Texas in accordance with federal law and acts as RTC's fiduciary agent; and,

WHEREAS, the Government Code, Chapter 791, and Transportation Code §201.209 authorize the State to contract with municipalities and political subdivisions to perform governmental functions and services; and,

WHEREAS, the Local Government is a political subdivision and governmental entity by statutory definition; and,

NOW, THEREFORE, for and in consideration of the mutual covenants and conditions contained herein, the parties agree as follows:

Article 1.0 Purpose. The purpose of this Agreement is to set out the roles and responsibilities of the STATE, LOCAL GOVERNMENT, and NCTCOG to implement the Sustainable Development PROJECT.

- 1.1 The STATE agrees to provide funding for the PROJECT awarded by the RTC and concurred by the Commission; on the terms and conditions set forth herein.
- 1.2 The LOCAL GOVERNMENT agrees to implement the PROJECT and provide necessary local match, according to the terms and conditions set forth herein.
- 1.3 The NCTCOG agrees to coordinate with the STATE and LOCAL GOVERNMENT on the implementation of the PROJECT, including reviewing eligible costs and recommending to the STATE payment of such costs, if consistent with the terms and conditions set forth herein.

Article 2.0 Definitions. For the purpose of this Agreement the following words and phrases shall be defined as follows:

CALL FOR PROJECTS: shall mean the request for Sustainable Development Project applications issued by the RTC on March 23, 2009.

OVERALL PROJECT: shall mean the entire project as applied for in the Call for Projects, including the funded portion of the PROJECT and any additional improvements funded by the City or a private sector through local sources. Evidence of significant progress toward completion of the OVERALL PROJECT shall be demonstrated by the LOCAL GOVERNMENT submitting a building permit for a mixed-use development.

PROJECT: shall mean the project as funded under this Agreement and as further defined by the map included as Attachment A and the scope of work included as Attachment B.

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PROJECT BUDGET: shall mean the budget or cost identifying all costs associated with and for the implementation of the PROJECT included in Attachment B.

Article 3.0 Scope. The LOCAL GOVERNMENT shall implement the PROJECT as described in Attachment B and in the Supporting Documentation as provided for in Article 11.1. Failure to complete the PROJECT may require the LOCAL GOVERNMENT to return funds received from the STATE for any expenses previously reimbursed within thirty (30) days. Any cost overruns are the responsibility of the LOCAL GOVERNMENT. Any modifications to the scope of work must be agreed to in advance and in writing by NCTCOG.

Article 4.0 Project Award. The PROJECT award for this Agreement is \$2,200,000. The LOCAL GOVERNMENT agrees to return funds received under this Agreement for reimbursed activities where the LOCAL GOVERNMENT has failed to comply with the requirements set forth in this Agreement, including but not limited to: failure to complete the PROJECT as identified in Attachment B, failure to show significant progress toward completion of the OVERALL PROJECT, and/or failure to comply with reporting requirements prescribed in Article 11.

4.1 Match. The LOCAL GOVERNMENT shall be responsible for a local match of \$440,000. The LOCAL GOVERNMENT shall document local match contribution in its requests for reimbursement. The LOCAL GOVERNMENT's contribution must be considered eligible expenses under this Agreement in order to constitute local match.

Article 5.0 Notices. All notices to each party by the other required under this Agreement shall be delivered personally or sent by certified or U.S. mail, postage prepaid or sent by electronic mail (electronic notice being permitted to the extent permitted by law but only after a separate written consent of the parties), addressed to such party at the following addresses:

STATE:

Texas Department of Transportation
 Attention: Director of Contract Services
 General Services Division
 125 East 11th Street
 Austin, Texas 78701
 T: (214) 320-6100
 F: (214) 320-4488

LOCAL GOVERNMENT:

City of McKinney
 Attention: Assistant Director of Panning
 P.O. Box 517
 McKinney, Texas 75070
 T: 972-547-7432

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NCTCOG:

North Central Texas Council of Governments
 Attention: Director of Transportation
 616 Six Flags Drive
 P.O. Box 5888
 Arlington, Texas 76005
 T: (817) 695-9240
 F: (817) 640-3028

All notices shall be deemed given on the date so delivered or so deposited in the mail, unless otherwise provided herein. Each party may change the above address by sending written notice of the change to the other party. Either party may request in writing that such notices shall be delivered personally or by certified U.S. mail and such request shall be honored and carried out by the other party.

Article 6.0 Term.

6.1 Agreement Time. This Agreement becomes effective when signed by the last party whose signing makes the Agreement fully executed.

6.2 Time of Performance. The LOCAL GOVERNMENT shall not commence performance of any portion of the PROJECT, nor incur any costs or obligations associated with those services, until the LOCAL GOVERNMENT has received written authorization from NCTCOG, in the form of a pre-award authorization or a notice to proceed.

6.3 Pre-Award Authorization. The LOCAL GOVERNMENT may obtain a pre-award authorization for approved cost not to exceed the twenty (20) percent local match contribution for the PROJECT. The costs incurred by the LOCAL GOVERNMENT prior to the execution of this Agreement may count towards the twenty (20) percent local match contribution provided such costs are for eligible expenses. Documentation of such expenditures must be provided to NCTCOG.

Costs incurred prior to execution of an Agreement are at the risk of the LOCAL GOVERNMENT and is not the responsibility of NCTCOG or the STATE to reimburse in the event an Agreement is not executed and/or the PROJECT is not completed as defined in Article 3.0.

NCTCOG will provide a copy of all pre-award authorizations to the Dallas District Engineer.

6.4 Limited/Full Notice to Proceed. A limited or full Notice to Proceed will be issued upon completion of a design and/or project review meeting, final execution of the Agreement, and necessary Article 11.1 documentation. Any activities completed prior to

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the receipt of a Notice to Proceed will not be eligible for reimbursement, unless specifically approved in writing by the STATE or NCTCOG.

NCTCOG will provide a copy of all limited/full Notices to Proceed to the Dallas District Engineer.

6.5 Project Schedule. NCTCOG may in its sole discretion terminate this Agreement if it concludes that the LOCAL GOVERNMENT has failed to begin the PROJECT by March 2013 or has not made significant progress towards the OVERALL PROJECT within the timeline identified in the Article 11.1 supporting documentation or by December 31, 2015, whichever occurs sooner. All changes to the schedule must be agreed to in writing by all three parties.

6.6 Agreement Term. This Agreement shall terminate at the completion of the OVERALL PROJECT. The PROJECT shall be considered complete upon NCTCOG's receipt of a Closeout Report as identified in Article 11.3.

6.7 Continuing Obligations. Termination of this Agreement does not invalidate any continuing obligations imposed by this Agreement.

6.8 Funding Availability. Any or all of the terms of this Agreement may be suspended or terminated in the event the STATE terminates funding for any reason.

6.9 Events of Default. In the event of a default of any terms or conditions set forth in this Agreement, The LOCAL GOVERNMENT shall repay any funds received from the STATE for implementation of this PROJECT within thirty (30) days. The LOCAL GOVERNMENT will be considered to be in default including but not limited to the following reasons: any material representation or warranty provided in reports or as part of this Agreement shall prove to be false, funds identified in the PROJECT BUDGET are used for purposes other than those stated in Attachment B, the LOCAL GOVERNMENT assigns or transfers the obligations set forth in this Agreement to a third party without prior written consent of the STATE and NCTCOG; the LOCAL GOVERNMENT fails to complete the PROJECT as required in Attachment B, or the LOCAL GOVERNMENT fails to cure a defect as outlined in Article 6.9.

6.10 Termination. Each party reserves the right to terminate this Agreement in whole or in part. Notice of termination must be provided in writing, shall set forth the reasons for termination, and shall provide for a minimum of forty-five (45) days to cure the defect. Termination is effective only in the event the party fails to cure the defect within the period stated in the termination notice including any written extensions. The Parties may terminate this Agreement at any time by mutual written concurrence.

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Article 7.0 Amendments.

7.1 Sole Agreement. The Agreement constitutes the sole and only agreement between the parties and supersedes any prior understandings or written or oral agreements respecting the Agreements' subject matter.

The LOCAL GOVERNMENT shall include all appropriate provisions of this Agreement in any subcontractor or developer awards to implement the Scope of work, including but not limited to Articles 9, 10, 11, and 12.

7.2 Severability. In the event any one or more of the provisions contained in this Agreement shall be for any reason held to be invalid, illegal, or unenforceable in any respect, such invalidity, illegality, or unenforceability shall not affect any other provision(s) hereof, and this Agreement shall be revised so as to cure such invalid, illegal, or unenforceable provision(s) to carry out as near as possible the original intent of the Parties.

7.3 Changed Circumstances. If future federal, State, or local statute, ordinance, regulation, rule, or action render this Agreement, in whole or in part, illegal, invalid, unenforceable, or impractical, the Parties agree to delete and/or to modify such portions of the Agreement as are necessary to render it valid, enforceable, and/or practical. Each section, paragraph, or provision of this Agreement shall be considered severable, and if, for any reason, any section, paragraph, or provision herein is determined to be invalid under current or future law, regulation, or rule, such invalidity shall not impair the operation of or otherwise affect the valid portions of this Agreement.

7.4 Amendments to Agreement. Modifications to this Agreement must be agreed to in writing.

Article 8.0 Rights.

8.1 Authority. The LOCAL GOVERNMENT shall have no authority to act for or on behalf of the STATE or NCTCOG. No other authority, power, use, or joint enterprise is granted or implied. The LOCAL GOVERNMENT may not incur any debts, obligations, expenses, or liabilities of any kind on behalf of the STATE or NCTCOG.

8.2 Assignment. Without the prior written consent of the STATE or NCTCOG, the LOCAL GOVERNMENT may not transfer or assign any rights or duties under or any interest in this Agreement.

8.3 Access. The LOCAL GOVERNMENT shall permit the STATE and/or NCTCOG, and their designee's access to the property at reasonable times during the time of performance. NCTCOG will notify the LOCAL GOVERNMENT of a desire to access the property and arrangements will be made as needed.

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8.4 Right of Way. Except for right of way owned by the STATE or to be acquired by the STATE according to the plans of the project as approved by the STATE, the LOCAL GOVERNMENT shall acquire all necessary right of way needed for the PROJECT. Right of Way acquisition is an eligible cost for reimbursement provided such cost is approved as shown in Attachment B.

8.5 Maintenance. The LOCAL GOVERNMENT agrees to construct, own (or secure appropriate perpetual easement to protect the project from future activities of landowners), operate (as applicable), and maintain all facilities developed or improved pursuant to this Agreement. The STATE and NCTCOG shall in no way be responsible for the maintenance of the PROJECT.

Article 9.0 Audits or Evaluations.

9.1 The LOCAL GOVERNMENT shall provide to the STATE and NCTCOG, for its review, a copy of any audit received as a result of LOCAL GOVERNMENT policy or audits of federal and state governments relating to the expenditure of grant funds. Such audits shall include or be accompanied by any applicable audit management letter issued and applicable responses to the auditor's findings and recommendations. All audits shall be submitted to the STATE and NCTCOG within thirty (30) days of receipt of each issued report.

9.2 The STATE and NCTCOG reserves the right to conduct financial and program monitoring of all awards to the LOCAL GOVERNMENT and to perform an audit of all records, related to this Agreement including but not limited to: contractor, developer, and/or other consultant Agreements related to the PROJECT. An audit by NCTCOG may encompass an examination of all financial transactions, all accounts and reports, as well as an evaluation of compliance with the terms and conditions of this Agreement.

9.3 STATE Audit. Within one hundred and twenty (120) days of completion of the PROJECT, the LOCAL GOVERNMENT shall perform an audit on PROJECT costs. Any funds due to STATE will be promptly paid by the LOCAL GOVERNMENT.

The state auditor may conduct an audit or investigation of any entity receiving funds from the STATE directly under the Agreement or indirectly through a subcontract under the Agreement. Acceptance of funds directly under the Agreement or indirectly through a subcontract under this Agreement acts as acceptance of the authority of the state auditor, under the direction of the legislative audit committee, to conduct an audit or investigation in connection with those funds. An entity that is the subject of an audit or investigation must provide the state auditor with access to any information the state auditor considers relevant to the investigation or audit.

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Article 10.0 Payments.

10.1 Conditions of Reimbursement. At regular milestones, but not more frequently than monthly, the STATE shall reimburse the LOCAL GOVERNMENT for eligible cost related to the PROJECT up to eighty (80) percent or **\$1,760,000** after review and recommendation from NCTCOG. The LOCAL GOVERNMENT shall provide reimbursement request to the NCTCOG for costs and expenses incurred in connection with the PROJECT. Each reimbursement request shall include:

- an invoice from the LOCAL GOVERNMENT detailing cost incurred
- progress reports
- copies of contractor and supplier invoices who support the PROJECT
- proof of payment to contractors and suppliers who support the PROJECT
- certification of activities as provided for in Article 10.2
- other documentation requested by NCTCOG

NCTCOG may deem a request for reimbursement incomplete if the data and/or documentation are incomplete or improper or if the LOCAL GOVERNMENT fails to submit necessary reports or provide other information requested by NCTCOG or the STATE under the terms of this Agreement. The NCTCOG may reject request for reimbursements which fail to demonstrate that costs are eligible for reimbursement and/or which fail to conform to the requirements of this Agreement.

Final reimbursement shall not be made until the LOCAL GOVERNMENT provides a Closeout report for PROJECT activities as defined in Article 11.3 of this Agreement.

10.2 Certifications. The LOCAL GOVERNMENT shall implement the PROJECT using the LOCAL GOVERNMENT's established design standards, construction specifications, procurement processes, and construction management and inspection procedures. As part of any reimbursement request, the LOCAL GOVERNMENT shall certify to the STATE and NCTCOG the project has followed all standards and procedures previously established by the LOCAL GOVERNMENT's governing body. Upon request, the LOCAL GOVERNMENT shall make available documentation to support performance reports including but not limited to: insurance certificates, performance or payment bonds, required licenses and permits, and reports submitted by contractors and/or the Developer(s).

10.3 Retainage. The LOCAL GOVERNMENT shall receive reimbursement from the STATE in the amount of costs claimed and certified on each invoice, subject to approval of claimed costs by NCTCOG less ten (10) percent retainage up to **\$220,000**.

10.4 Ineligible Expenses. Funds obligated under this Agreement shall only be used for construction aspects of the PROJECT. The LOCAL GOVERNMENT will not be reimbursed for ineligible expenses which include but are not limited to: construction or rehabilitation of private buildings, artwork, fountains, installation and/or rehabilitation and/or relocation of water and sewer lines, burying and/or relocating utilities, parking garages, local roads that provide no connection to the main transportation network,

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earthwork necessary to raise proposed buildings out of the floodplain, roadway reconstruction, and other items not directly related to mobility. Expenditures such as staffing, maintenance of improvements, design and/or construction management fees, legal fees, permitting, platting, travel, vehicles, lobbying, land acquisition unassociated with transportation improvements and/or land acquisition of condemned properties, advertising, billboards, consumables, and any other non-construction activities inconsistent with the intent of the Sustainable Development program are not eligible.

10.5 Eligible Expenses. Costs must be determined to be the reasonable, necessary, actual, and eligible costs of conducting an approved activity in accordance with the PROJECT to be eligible for reimbursement as provided for in the approved in the Article 11.1 Supporting Documentation.

10.6 STATE Reimbursement. Reimbursement of expenditures related to this Agreement may begin no earlier than thirty (30) days after execution of this Agreement. The STATE will reimburse the LOCAL GOVERNMENT for expenditures in RTC approved cost categories, as detailed in Attachment B, upon review and recommendation by NCTCOG to the STATE that expenditures are eligible and necessary. The STATE shall pay the LOCAL GOVERNMENT within thirty (30) days of receiving NCTCOG's payment recommendation.

10.7 Cost Overruns. The LOCAL GOVERNMENT agrees to keep project cost within the approved PROJECT BUDGET and shall not be eligible for reimbursement of any cost overruns. Cost overruns are the sole responsibility of the LOCAL GOVERNMENT. The STATE and/or NCTCOG are not responsible for any costs other than as outlined herein.

10.8 Cost Underruns. Cost underruns may not be used for additional Scope activities without prior written consent of NCTCOG.

10.9 Availability of Funds. This Agreement and all claims, suits, or obligations arising under or related to this Agreement are subject to and limited to the receipt and availability of funding. If funding is not available due to a default, this Agreement shall terminate.

Article 11.0 Reporting Requirements. All reports identified in this section shall be provided to NCTCOG in a format approved by NCTCOG.

11.1 The LOCAL GOVERNMENT shall provide a list of Supporting Documentation for the PROJECT and OVERALL PROJECT at agreed upon Phases throughout the PROJECT. The Phases provided for and approved by NCTCOG in this document will determine the milestones at which the LOCAL GOVERNMENT will receive reimbursement and items eligible for reimbursement. This Supporting Documentation shall be received prior to issuance of a Pre-Award Authorization or a Notice to Proceed and at a minimum should include:

- supporting schedules
- project description

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- project budget/reimbursable items
- site plans and parcel maps
- appraisal data
- infrastructure improvement illustrations
- details of right of way to be acquired, each with parcel information, photos, and maps (if applicable)
- project photos, each with directional notations
- private development phasing, acreage, and units

11.2 Milestone and Invoice Reporting. The LOCAL GOVERNMENT shall provide written progress reports of its actions under this Agreement at milestones as agreed upon in the Supporting Documentation identified in Article 11.1. Each progress report shall at a minimum include:

- any actions relative to the PROJECT during the current phase
- percentage of work complete
- activities of work complete
- all approved project modifications
- updated photos, each with directional notations
- identification of work delays
- actions taken to mitigate delays
- status of the schedule and budget

Milestone reports shall be included with each invoice submittal and sent to NCTCOG.

11.3 Closeout Report. The LOCAL GOVERNMENT shall prepare a closeout report to document actual project costs, final program activities of the PROJECT, and documentation of significant progress towards OVERALL PROJECT completion by evidence of a building permit or other approved document, to NCTCOG. This report shall be provided to NCTCOG no later than sixty (60) days from the completion of the PROJECT. Payment of the retainage is contingent upon completion of the closeout report.

11.4 OVERALL PROJECT Closeout. The LOCAL GOVERNMENT shall prepare a status report to update activities on the OVERALL PROJECT no later than three (3) years after execution of this Agreement.

12.0 Assurances.

12.1 Interest of Public Officials. No member, officer, or employee of the public body or of a local public body during his tenure or for one (1) year thereafter shall have any interest, direct or indirect, in this Agreement or the proceeds thereof.

12.2 Noncollusion. The LOCAL GOVERNMENT warrants that it has not employed or retained any company or person, other than a bona fide employee working for it, to solicit or secure this Agreement, and that it has not paid or agreed to pay any company or person, other than a bona fide employee, any fee, commission, percentage,

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brokerage fee, gift or any other consideration contingent upon or resulting from the award or making of this Agreement. If the LOCAL GOVERNMENT breaches or violates this warranty, the STATE and/or NCTCOG shall have the right to annul this Agreement without liability or, in its discretion, to deduct from the Agreement price or consideration, or otherwise recover the full amount of such fee, commission, brokerage fee, gift, or contingent fee.

12.3 Debarment/Suspension. The LOCAL GOVERNMENT is prohibited from making any award or permitting any award at any tier to any party which is debarred or suspended or otherwise excluded from or ineligible for participation in federal assistance programs under Executive Order 12549, Debarment and Suspension. The LOCAL GOVERNMENT and its subcontractors shall include a statement of compliance with Federal and State Debarment and suspension regulations in all Third-party contracts.

The LOCAL GOVERNMENT shall notify NCTCOG if the LOCAL GOVERNMENT or any of the LOCAL GOVERNMENT's contractors becomes debarred or suspended during the performance of this Agreement. Debarment or suspension of the LOCAL GOVERNMENT or any of the LOCAL GOVERNMENT's contractors may result in immediate termination of this Agreement.

12.4 Restrictions on Lobbying. The LOCAL GOVERNMENT is prohibited from using funds awarded under this Agreement for lobbying purposes. The LOCAL GOVERNMENT shall include a statement of compliance with this provision in applicable procurement solicitations and Third-Party contracts.

12.5 Disadvantaged Business Enterprise. It is the policy of the STATE and NCTCOG to maximize opportunities for Disadvantaged Business Enterprises to participate in the performance of contracts financed in whole or in part with federal funds under this Agreement. The LOCAL GOVERNMENT agrees to ensure that DBE's have the maximum opportunity to participate in the performance of contracts and subcontracts financed in whole or in part with federal funds under this Agreement. Upon request, the LOCAL GOVERNMENT shall report DBE participation.

12.6 Compliance with Regulations- Environmental Review and Public Involvement. Each party shall comply with all federal, state, and local laws, statues, ordinances, rules and regulations, and the orders and decrees of any courts, administrative bodies or tribunals affecting the performance of this Agreement as applicable to it. The LOCAL GOVERNMENT shall ensure that the PROJECT complies with all environmental review and public involvement requirements applicable to the LOCAL GOVERNMENT under state and federal law in connection with the PROJECT. The LOCAL GOVERNMENT shall obtain the opinion of legal counsel showing the LOCAL GOVERNMENT's environmental review and public involvement for the PROJECT complies with state law and regulations, and with local laws, regulations, rules, policies, and procedures applicable to the LOCAL GOVERNMENT. The LOCAL GOVERNMENT shall maintain a copy of the certification in the project files. When required, the LOCAL GOVERNMENT shall furnish the STATE and NCTCOG with satisfactory proof of compliance.

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Article 13.0 Miscellaneous Provisions.

13.1 Responsibilities of Parties.

a. The STATE, LOCAL GOVERNMENT, and NCTCOG agree that neither party is an agent, servant, or employee of the other party and each party agrees it is responsible for its individual acts and deeds, as well as the acts and deeds of its contractors, employees, representatives, and agents.

b. To the extent permitted by law, the LOCAL GOVERNMENT agrees to indemnify and save harmless the STATE and NCTCOG, its agents and employees from all suits, actions or claims and from all liability and damages resulting from any and all injuries or damages sustained by any person or property in consequence of any neglect, error, or omission in the performance of the design, construction, maintenance or operation of the PROJECT by the LOCAL GOVERNMENT, its contract(s), subcontract(s), agents and employees, and from any claims or amounts arising or recovered under the "Worker's Compensation laws"; the Texas tort Claims Act, Chapter 101, Texas Civil Practice and Remedies Code; or any other applicable laws or regulations, all as from time to time may be amended.

c. The Parties expressly agree that the PROJECT is not a joint venture or enterprise. However, if a court should find that the Parties are engaged in a joint venture or enterprise, then the LOCAL GOVERNMENT, to the extent provided by law, agrees to pay any liability adjudicated against the STATE for acts and deeds of the LOCAL GOVERNMENT, its employees or agents during the performance of the PROJECT.

d. To the extent provided by law, the LOCAL GOVERNMENT shall also indemnify and save harmless the STATE and NCTCOG from any and all expenses, including, but not limited to, attorney's fees which may be incurred by the STATE in litigation or otherwise resisting said claim or liabilities which may be imposed on the STATE as a result of such activities by the LOCAL GOVERNMENT, its agents, or employees.

13.2 Force Majeure. It is expressly understood and agreed by the parties to this Agreement that, if the performance of any provision of this Agreement is delayed by force majeure, defined as reason of war, civil commotion, act of God, governmental restriction, regulation or interference, fire, explosion, hurricane, flood, failure of transportation, court injunction, or any circumstances which are reasonably beyond the control of the party obligated or permitted under the terms of this Agreement to do or perform the same, regardless of whether any such circumstance is similar to any of those enumerated herein, the party so obligated or permitted shall be excused from doing or performing the same during such period of delay, so that the period of time applicable to such requirement shall be extended for a period of time equal to the period of time such party was delayed. Each party must inform the other in writing within reasonable time of the existence of such force majeure.

13.3 Contractual Relationship. It is understood and agreed that the relationship described in this Agreement between the parties is contractual in nature and is not to be construed to create a partnership of joint venture or agency relationship between the

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parties. Nor shall any party be liable for any debts incurred by the other party in the conduct of such other party's business or functions.

13.4 Insurance. If this Agreement authorizes the LOCAL GOVERNMENT or its contractors to perform any work on State right of way, before beginning work the entity performing the work shall provide the STATE with a fully executed copy of the State's Form 1560 Certificate of Insurance verifying the existence of coverage in the amounts and types specified on the Certificate of insurance for all persons and entities working on State right of way. This coverage shall be maintained until all work on the State right of way is complete. If coverage is not maintained, all work on State right of way shall cease immediately, and the State may recover damages and all costs of completing the work.

13.5 Procurement and Contracting Process. The STATE and NCTCOG may review the LOCAL GOVERNMENT's procurement of professional services for professional services for engineering, surveying, right of way acquisition, letting of construction contracts, and construction management and inspection. The LOCAL GOVERNMENT shall certify compliance with state law and regulations, and with local laws, regulations, rules, policies, and procedures. Copies of these certifications must be maintained in the PROJECT files and made available upon request.

13.6 Utilities. The LOCAL GOVERNMENT shall be responsible for the adjustment, removal, or relocation of utility facilities in accordance with State laws and regulations and local laws, regulations, rules, policies, and procedures application to the LOCAL GOVERNMENT. The LOCAL GOVERNMENT must obtain advance approval for any variance from established procedures. This Agreement may not cover cost associated with utility relocation, if any reimbursement is deemed eligible the utility must have a property right as shown in a recorded deed or easement.

13.7 Disputes and Remedies. The LOCAL GOVERNMENT and NCTCOG shall negotiate in good faith toward resolving any disputes that arise under this Agreement. The Agreement shall not be considered as specifying an exclusive remedy for a breach of the Agreement. All remedies existing at law or in equity are available to either party and are cumulative.

13.8 Records and Project Documents. The LOCAL GOVERNMENT shall maintain a record keeping system for all of its activities, including program records and financial management records, which support and document all expenditures of funds made under this Agreement, in accordance with federal regulations, state rules, and the Funding Agreement. This section shall not be interpreted to require maintenance of multiple exact duplicate copies of any record or document.

All records must be maintained for a minimum of three (3) years after PROJECT closeout. In the event that any litigation or claim is still pending before the expiration of the three-year period, these records shall be retained until resolution of the litigation or claim. NCTCOG, STATE, and their duly authorized agents shall have reasonable access

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to all records that are directly applicable to this Agreement for the purpose of making audit(s) examinations.

Upon completion or termination of this Agreement, all documents prepared by the STATE shall remain the property of the STATE. All data prepared under this Agreement by the LOCAL GOVERNMENT shall be made available to the STATE and NCTCOG without restriction or limitation on their further use. All documents produced or approved or otherwise created by the LOCAL GOVERNMENT shall be transmitted to the STATE in the form of photocopy reproduction as required by the STATE. The originals shall remain the property of the LOCAL GOVERNMENT. At the request of the STATE or NCTCOG, the LOCAL GOVERNMENT shall submit any information required by the STATE or NCTCOG in the format directed by the STATE or NCTCOG.

13.9 Confidentiality. The LOCAL GOVERNMENT, NCTCOG, and the STATE shall ensure that all information, both written and verbal, deemed confidential by law that is obtained through implementation of the PROJECT will remain confidential, subject to the Texas Public Information Act.

13.10 Gratuities. Any person doing business with or who, reasonably speaking, may do business with NCTCOG under this Agreement, may not make any offer of benefits, gifts or favors to employees of NCTCOG. Failure on the part of the LOCAL GOVERNMENT to adhere to this policy may result in termination of this Agreement.

13.11 Equal Employment Opportunity. The LOCAL GOVERNMENT shall not discriminate against any employee or applicant for employment because of race, religion, color, sex, or national origin. The LOCAL GOVERNMENT shall take affirmative action's to ensure that applicants are employed, and that employees are treated, during their employment, without regard to their race, religion, color, sex, or national origin. Such actions shall include, but not be limited to, the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship.

13.12 Nondiscrimination on the Basis of Disability. The LOCAL GOVERNMENT agrees that no otherwise qualified disabled person shall, solely by reason of his disability, be excluded from participation in, be denied the benefits of, or otherwise be subject to discrimination under the project. The LOCAL GOVERNMENT shall insure that all fixed facility construction or alteration and all new equipment included in the project comply with applicable regulations regarding Nondiscrimination on the Basis of Disability in Programs and Activities Receiving or Benefiting from Federal Financial Assistance, set forth in 49 CFR, Part 27 and any amendments thereto.

13.13 Title VI. The LOCAL GOVERNMENT shall work cooperatively with NCTCOG to implement appropriate PROJECT activities to address environmental justice in minority and low-income populations, and to address needs from persons with limited English proficiency.

CSJ: 0918-24-181
Project Name: Historic Flour Mill Catalyst TOD
Sustainable Development Project
District #18-Dallas
Code Chart 64# 00200
Funding Category: RTR (SH 121 Subaccount Funds)

13.14 Drug Free Workplace. The LOCAL GOVERNMENT shall establish a drug-free workplace in accordance with the Drug-Free Workplace Act.

13.15 Compliance with Texas Accessibility Standards and ADA. The LOCAL GOVERNMENT shall ensure the plans for and the construction of the PROJECT is in compliance with the Texas Accessibility Standards (TAS) issued by the Texas Department of Licensing and Regulation, under the Architectural Barriers Act, Article 9102, Texas Civil Statutes.

13.16 Signatory Warranty. The signatories to this Agreement warrant that each has the authority to enter into this Agreement on behalf of the party they represent.

Attachments

The following appendices are attached and made part of this Agreement.

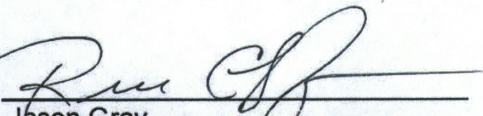
- A. Project Location Map
- B. Scope of Work and Payment Provisions

CSJ: 0918-24-181
Project Name: Historic Flour Mill Catalyst TOD
Sustainable Development Project
District #18-Dallas
Code Chart 64# 00200
Funding Category: RTR (SH 121 Subaccount Funds)

IN WITNESS HEREOF, the parties have executed this Agreement in triplicate originals.


The LOCAL GOVERNMENT

City of McKinney

By 
Jason Gray City Manager By Rick Chaffin, Deputy City Manager
and authorized signatory

Date 6/30/2011

The NORTH CENTRAL TEXAS COUNCIL OF GOVERNMENTS

By 
Mike Eastland
Executive Director

Date 7/8/11

The STATE

Executed for the Executive Director and approved for the Texas Transportation Commission for the purpose and effect of activating and/or carrying out the orders, established policies or work programs heretofore approved and authorized by the Texas Transportation Commission.

By 
Janice Mullenix
Director of Contract Services
Texas Department of Transportation

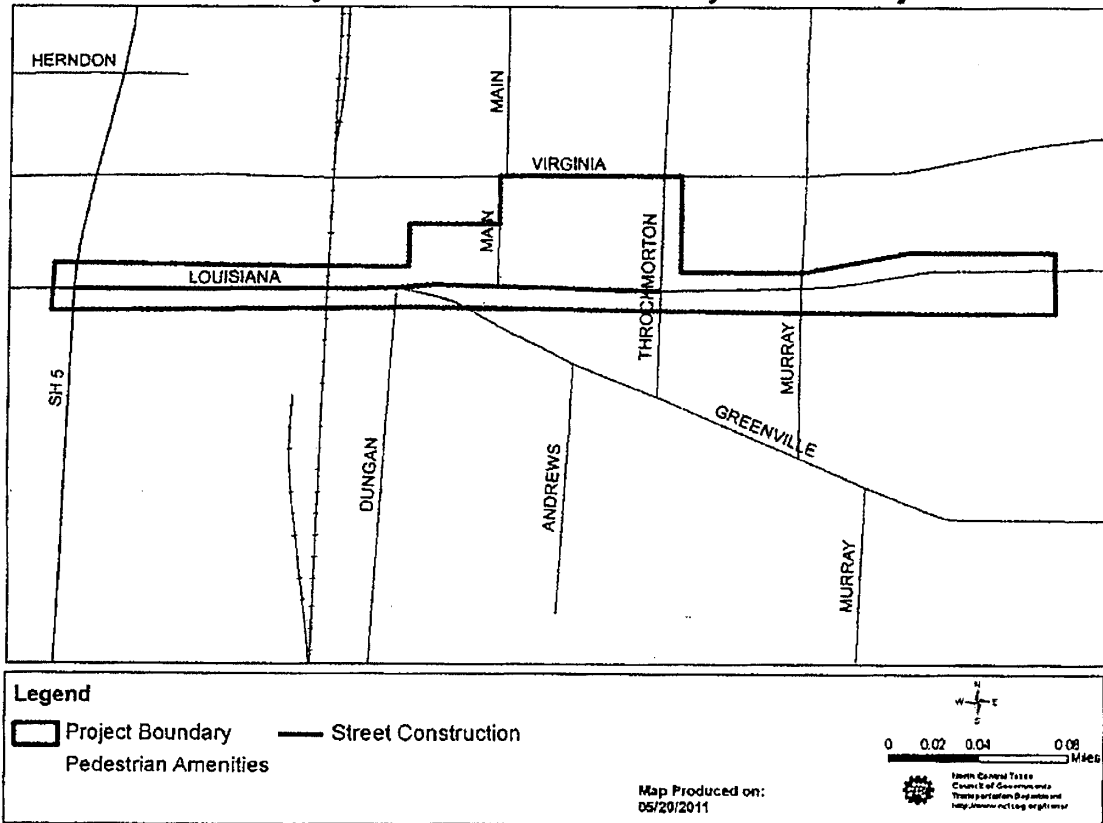
Date August 24, 2011

CSJ: 0918-24-181
Project Name: Historic Flour Mill Catalyst TOD
Sustainable Development Project
District #18-Dallas
Code Chart 64# 00200
Funding Category: RTR (SH 121 Subaccount Funds)

Attachment A

Project Map

McKinney Historic Flour Mill Catalyst TOD Project



CSJ: 0918-24-181
 Project Name: Historic Flour Mill Catalyst TOD
Sustainable Development Project
 District #18-Dallas
 Code Chart 64# 00200
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ATTACHMENT B

The STATE will pay **\$1,760,000** from the SH 121 Subaccount for The City of McKinney Historic Flour Mill Catalyst TOD Sustainable Development Infrastructure Project to acquire right-of-way and construct pedestrian amenities, intersection improvements, bike connections, and street improvements to support the Historic Flour Mill mixed use development. The project is located on Louisiana Street, bounded by State Highway 5 on the West and 520ft East of Murray Street to the East, and on Throckmorton Street, bounded by Virginia to the North and Louisiana to the South. The project deliverables include right-of way acquisition, pedestrian amenities, intersection improvements, bike connections, and street improvements on Louisiana, from State Highway 5 to Throckmorton Street, to retrofit two-way travel lanes and parking lanes.

"In accordance with the allocation of funds approved by the RTC, and concurred with by the Texas Transportation Commission, the State will make the payments for the following work within 30 days after recommendation from NCTCOG, but not prior to the Fiscal Years shown:"

RIGHT OF WAY AND CONSTRUCTION COSTS						
Description	Fiscal Year	Total Estimate Cost	Regional Toll Revenue (RTR) SH 121 Subaccount Funds Participation		Local Government Participation	
			%	\$	%	\$
Right of Way	2011	\$30,000	0%	\$0.00	1.36%	\$30,000
Engineering	2011	\$218,000	0%	\$0.00	9.90%	\$218,000
Construction	2011	\$1,952,000	80%	\$1,760,000	8.74%	\$192,000
TOTAL		\$2,200,000	80%	\$1,760,000	20%	\$440,000

The LOCAL GOVERNMENT shall be responsible for a required local match **\$440,000** Upon completion of the PROJECT, the NCTCOG will issue a signed "Notification of Completion" document to the STATE. The notice shall certify that the PROJECT has been completed, all necessary inspections have been conducted, and the PROJECT is open to traffic.

This is an estimate only; final participation amounts will be based on actual charges to the project.

Historic Flour Mill Redevelopment Project
Overall Scope
(as updated by developer Brad Kidwell on 3/31/11)

Project Phases

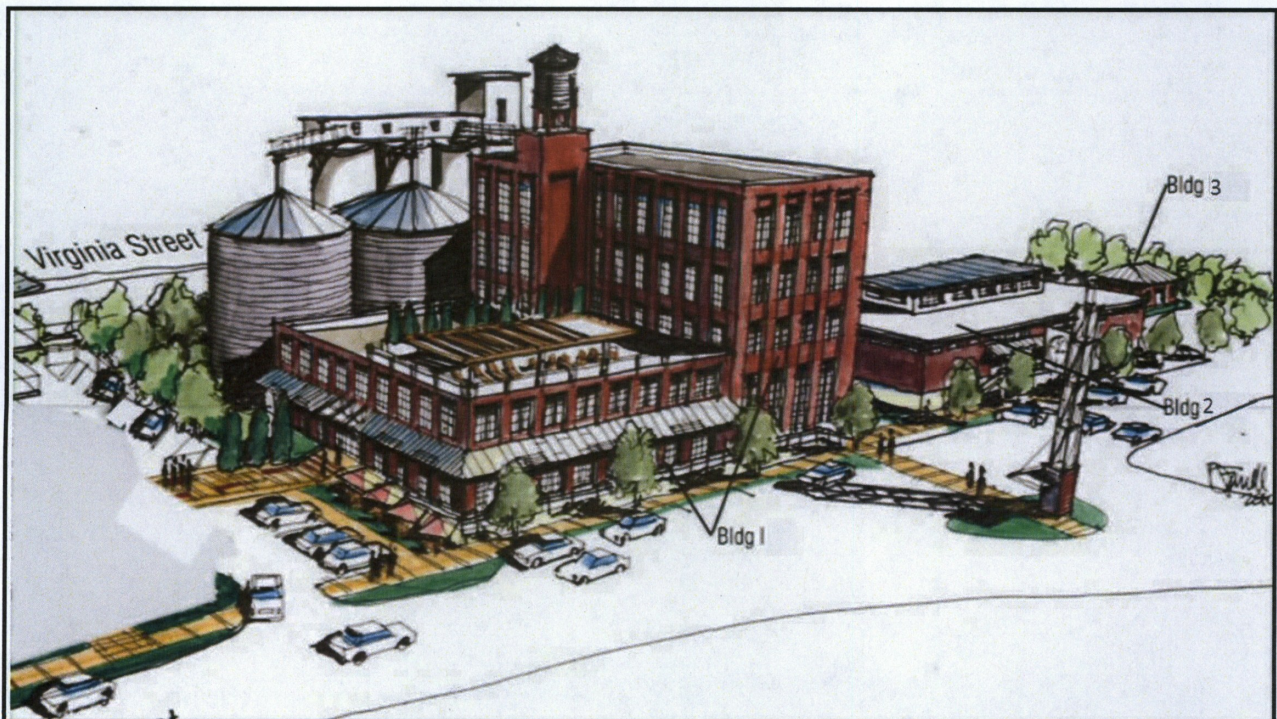
Phase 1: completed in March 2011; completion of this phase is considered part of the developer's obligation for the NCTCOG grant

Phase 2(a): currently underway; completion of this phase is considered part of the developer's obligation for the NCTCOG grant

Phase 2(b): completion of this phase is considered part of the developer's obligation for the NCTCOG grant

Phase 3(a): completion of this phase is considered part of the developer's obligation for the NCTCOG grant

Phase 3(b): not part of the NCTCOG grant



Phase 1

415 E. Louisiana (4-story portion of building #1)

- 1st Floor: renovation/finish-out of new Event Hall (2,960 square feet)

415 E. Louisiana and 407 E. Louisiana (2-story portion of building #1)

- miscellaneous interior and exterior improvements (electrical, plumbing, building, mechanical, fire) to bring up to code (including restroom expansion; upgrade of fire protection system; stairs/ramp and ADA accessibility)
- Start: November 2010
- Finish: March 2011
- Cost: \$90,000

Phase 2(a)

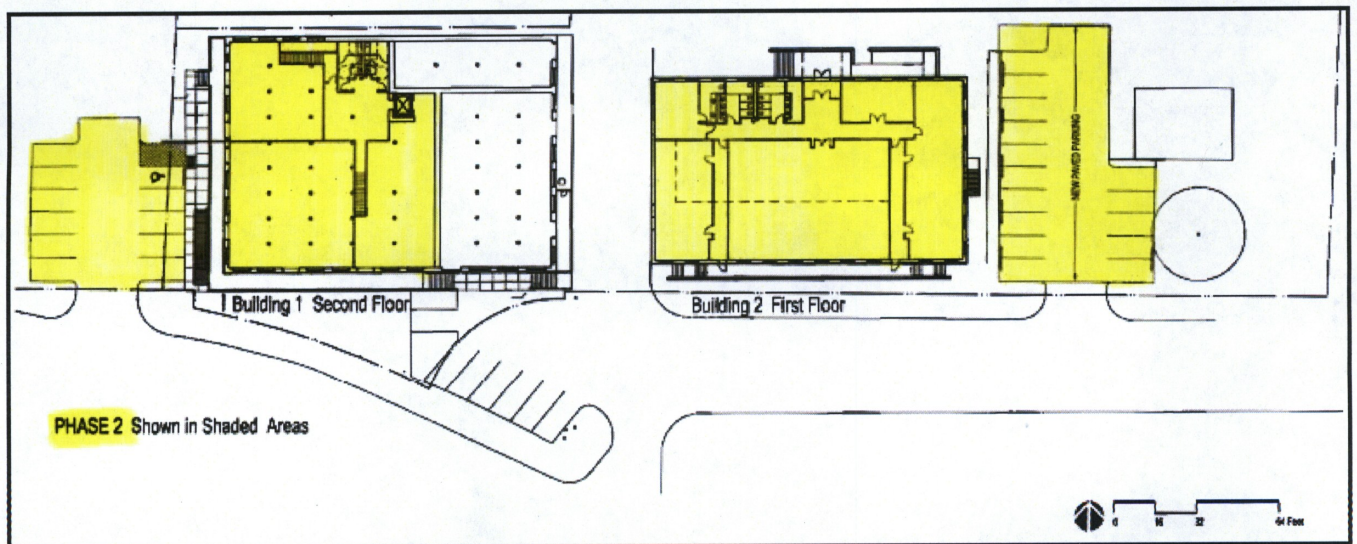
407 E. Louisiana (2-story portion of building #1)

- 1st Floor and 2nd Floor: code compliance improvements to existing office spaces (11,412 square feet)
- Parking: Construct additional parking spaces in order to satisfy parking requirements for all occupied spaces within 1st and 2nd floors of building #1 OR execute an agreement with the City and/or MCDC initiating the construction of public parking spaces on an adjacent property and authorizing use of those parking spaces
- Projected Start: November 2010
- Projected Finish: June 2011
- Projected Cost: from \$7,800 to \$124,500

Phase 2(b)

501 E. Louisiana (building #2)

- Renovation/finish-out of a new Event Hall (9,000 gross square feet) for eventual relocation of the Event Hall from 1st floor of 4-story portion of building #1
- Basement: possible renovation for new retail space (1,800 square feet)
- Parking: construction of new on-site parking lot adjacent to the east of building #2 to provide parking required by Phase 2(b)
- Projected Start: July 2011
- Projected Finish: December 2011
- Projected Cost: \$163,500



Phase 3(a)

415 E. Louisiana (4-story portion of building #1)

- 3rd and 4th Floor: full renovation/finish-out (10,000 gross square feet) for new live/work loft residential dwelling units (preliminary plans indicate 4 lofts on each floor = 8 total lofts, but the # of lofts is subject to change slightly depending on the final sizes of each individual loft)
- 2nd Floor: renovation/finish-out for new office space (5,000 gross square feet)
- New roof-top garden/patio on the roof of the 2-story portion of building #1 (4,000 gross square feet)
- Parking: construction of new on-site parking lot adjacent to the north of building #2 to provide parking required by Phase 3(a)
- Projected Start: January 2012
- Projected Finish: December 2012
- Projected Cost: \$1,409,965

Phase 3(b)

415 E. Louisiana (4-story portion of building #1)

- 1st Floor: renovate the former Event Hall space for new executive office suites/conference center (2,960 square feet), plus possible creation of a mezzanine office space (1,142 square feet)
- Projected Start: August 2012
- Projected Finish: December 2012
- Projected Cost: \$118,000

