Community Development and Renewal Agency of Herriman City Agenda

Thursday, June 23, 2022

NOTICE IS HEREBY GIVEN that the Herriman City Council shall assemble for a meeting in the City Council Chambers, located at
5355 WEST HERRIMAN MAIN STREET, HERRIMAN, UTAH

1. **Call to Order (3:00 PM or shortly thereafter)**

2. **Approval of Minutes**

   2.1. Approval of the May 11, 2022 Community Development and Renewal Agency meeting minutes

   2.2. Motion for review and outline of the finalization process to approve the minutes of June 23, 2022

3. **Discussion and Action Items**

   3.1. Discussion and consideration of an amendment to the interlocal agreement between Herriman City and the Community Development and Renewal Agency of Herriman City with respect to sales tax in the Auto Mall area – Nathan Cherpeski, City Manager

   3.2. Discussion and consideration of a resolution approving participation agreements with specified end users for the auto mall area – Nathan Cherpeski, City Manager

4. **Adjournment**

In accordance with the Americans with Disabilities Act, Herriman City will make reasonable accommodation for participation in the meeting. Request assistance by contacting Herriman City at (801) 446-5323 or info@herriman.org and provide at least 48 hours advance notice of the meeting.

ELECTRONIC PARTICIPATION: Members may participate electronically via telephone, Skype, or other electronic means during this meeting.

I, Wendy Thorpe, certify the foregoing agenda was emailed to at least one newspaper of general circulation within the geographic jurisdiction of the public body, at the principal office of the public body, on the Utah State Public Notice website www.utah.gov/pmn/index.html and on Herriman City's website at www.herriman.org

Posted and Dated this 21st day of June, 2022

Wendy Thorpe
Deputy City Recorder

HERRIMAN CITY

COMMUNITY DEVELOPMENT AND RENEWAL AGENCY OF HERRIMAN CITY MINUTES

Wednesday, May 11, 2022
Awaiting Formal Approval

The following are the minutes of the Community Development and Renewal Agency of Herriman City. The meeting was held on **Wednesday, May 11, 2022 at 6:30 p.m.** in the Herriman City Council Chambers, 5355 West Herriman Main Street, Herriman, Utah. Adequate notice of this meeting, as required by law, was posted in City Hall, on the City's website, and delivered to members of the Council, media, and interested citizens.

Presiding: Chair Lorin Palmer

Directors Present: Jared Henderson, Teddy Hodges, and Steve Shields

Staff Present: City Manager Nathan Cherpeski, Assistant City Manager Wendy Thomas, Assistant City Manager Tami Moody, Deputy City Recorder Wendy Thorpe, Finance Director Alan Rae, City Attorney Chase Andrizzi, Communications Specialist Destiny Skinner, Police Chief Troy Carr, Deputy Chief of Police Cody Stromberg, Public Works Director Justun Edwards, Operations Director Monte Johnson, Deputy Director of Parks, Recreation and Events Anthony Teuscher, Planning Manager Clinton Spencer, and Building Official Cathryn Nelson.

Directors Excused: Sherrie Ohrn

6:30 PM: (OR AS SOON AS POSSIBLE THEREAFTER)

1. **Call to Order**

Chair Palmer called the meeting to order at 7:01 p.m.

2. **Discussion and Action Items**

   2.1. **Discussion and consideration of a resolution of the Community Development and Renewal Agency of Herriman City to adopt the tentative budget for the fiscal year beginning July 1, 2022 and ending June 30, 2024** – Alan Rae, Finance Director

Finance Director Alan Rae presented the tentative budget for the Herriman Towne Center Community Development Area, Herriman Business Park Community Development Area, Anthem Business Park Community Development Area, and the Innovative District Community Development Area. He recommended the Board provide authorization to hold a public hearing related to the budget on May 25, 2022 and accept the tentative budget as prepared.

Director Shields moved to approve Resolution No. R2022-03 acknowledging receipt of a proposed budget for the fiscal year beginning July 1, 2022, and ending June 30, 2024, and setting a date for a public hearing. Director Henderson seconded the motion.

The vote is recorded as follows:

Director Jared Henderson	*Aye*
Director Steven Shields	*Aye*
Director Sherrie Ohrn	*Absent*
Director Teddy Hodges	*Aye*
Chair Lorin Palmer	*Aye*

The motion passed unanimously with Director Ohrn being absent.

3. **Adjournment**

Director Shields moved to adjourn the Community and Development Renewal Agency meeting at 7:03 p.m. Director Henderson seconded the motion, and all voted aye.

I, Jackie Nostrom, City Recorder for Herriman City, hereby cetify that the foregoing minutes represent a true, accurate and complete record of the meeting held on May 11, 2022. This document constitutes the official minutes for the Community Development and Renewal Agency Meeting.

Jackie Nostrom, MMC
City Recorder

STAFF REPORT

DATE: June 14, 2022

TO: The Honorable Mayor and City Council

FROM: Nathan Cherpeski

SUBJECT: Amend the interlocal agreement between the the Community Development and Renewal Agency and Herriman City with respect to sales tax from the Auto Mall area.

RECOMMENDATION:

Approve the amendment to the interlocal agreement as presented.

ISSUE BEFORE COUNCIL:

Does the Council/Agency wish to amend the Interlocal Agreement to meet current direction provided to staff?

BACKGROUND/SUMMARY:

The attached amendment amends the existing Interlocal Agreement.

DISCUSSION:

In December of 2019, Herriman City and the Community Development and Renewal Agency of Herriman City entered into an Interlocal Agreement regarding the sharing of the City's sales tax for a fixed 15 year term. The agreement provided that the City would share 70% of the City's direct sales tax portion with the Agency to facilitate development of the Auto Mall. While the agreement does not provide a maximum it is time limited. The individual participation agreements will establish the maximum incentive.

The attached amendment recognizes changes that have occurred since 2019 in the direction the City and Agency have taken to incentivize the development.

ALTERNATIVES:

1. Approve the amendment as presented
2. Amend the agreement further. Both the CDRA and the City must approve of the changes
3. Decline to act at this time and provide staff further directions.

FISCAL IMPACT:

ATTACHMENTS:

FIRST AMENDMENT TO THE INTERLOCAL AGREEMENT BY AND BETWEEN THE COMMUNITY DEVELOPMENT AND RENEWAL AGENCY OF HERRIMAN CITY AND HERRIMAN CITY WITH RESPECT TO SALE TAX (AUTO MALL)

THIS FIRST AMENDMENT TO THE INTERLOCAL AGREEMENT BY AND BETWEEN THE COMMUNITY DEVELOPMENT AND RENEWAL AGENCY OF HERRIMAN CITY AND HERRIMAN CITY WITH RESPECT TO SALE TAX (AUTO MALL) (the "First Amendment") is made this _____ day of __________________________, 2022, by and between Herriman City, a Utah municipal corporation ("City"), and the Community Development And Renewal Agency of Herriman City ("Agency"). City and Agency may be referred to herein individually as "Party" and collectively as the "Parties."

RECITALS

A. On or about December 11, 2019, the Parties entered into an Interlocal Agreement with regard to the sharing of the City's sales tax (the "Original Agreement").

B. Unless otherwise defined in the body of this First Amendment, the capitalized terms used in the First Amendment are defined in the Original Agreement.

C. The Parties desire to amend Section 3(b) of the Original Agreement regarding the Incentive Amount as more particularly set forth herein.

NOW, THEREFORE, for good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, City and Master Developer hereby amend the Original MDA as follows:

AMENDMENT

1. **Effect of Amendment**. Except as specifically amended by this Amendment, the Original Agreement shall remain in full force and effect.

2. **Amendment to Section 3(b) of the Original Agreement**. Section 3(b) of the Original Agreement is hereby amended to read as follows (with added language shown by underlining and deletions show by ~~strikethrough~~):

> **Incentive Amounts**. The total Agency Share paid to the Agency under this Agreement shall not exceed the ~~amount~~ sum of sale tax increment due and owing to any one or more participants under one or more duly executed participation agreements between the Agency and such participants (the "Participation Agreement" or "Participation Agreements") ~~Herriman 73 Partners LLC pursuant to the certain Participation agreement between the Agency and Herriman 73 Partners LLC of even date hereof ("Participation Agreement")~~.

IN WITNESS WHEREOF, the City and Agency have caused these presents to be signed.

[Notaries and signatures to follow]

CITY
Herriman City, a municipal corporation

____
NATHAN CHERPESKI, City Manager

ATTEST

____
JACKIE NOSTROM, City Recorder

____
TODD SHEERAN , City Attorney
Approved as to form and legality

AGENCY

____
LORIN PALMER, Chair of the Board

ATTEST

____
JACKIE NOSTROM, Secretary

____
, Agency Attorney
Approved as to form and legality

HERRIMAN CITY

STAFF REPORT

DATE: June 17, 2022

TO: The Honorable Mayor and City Council

FROM: Nathan Cherpeski

SUBJECT: Participation agreements with specified end users for the auto mall area.

RECOMMENDATION:
Approve the agreements as attached.

ISSUE BEFORE COUNCIL:
Does the agency wish to enter into the attached participation agreements?

BACKGROUND/SUMMARY:
Participation agreements with specified end users for the auto mall zone. The agreements spell out the total incentive available to the user and the time frame it is available.

DISCUSSION:
The Agency has been actively working on the development of an Auto Mall and auto related development for many years. In order to facilitate development of the auto mall area, the Agency will offer incentives to end users. The incentives are tied directly to the amount of sales tax each user generates.

5355 W. Herriman Main St. • Herriman, Utah 84096
(801) 446-5323 office • (801) 446-5324 fax • herriman.org

ALTERNATIVES:

1. Approve the agreements as presented
2. Amend the agreements and approve. Any changes would have to be renegotiated with the applicants. Provide staff direction on how to handle those negotiations.
3. Decline to act at this time and provide staff further direction.

FISCAL IMPACT:
Sales Taxes generated by a specific user are the only funds availabe to that user for incentive. In the event they do not generate the full amount, they are not entitlted to any other funds.

ATTACHMENTS:

5355 W. Herriman Main St. • Herriman, Utah 84096
(801) 446-5323 office • (801) 446-5324 fax • herriman.org

PARTICIPATION AGREEMENT

Between

THE COMMUNITY DEVELOPMENT AND
RENEWAL AGENCY OF HERRIMAN CITY

And

GERMAIN MARINE

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This Participation Agreement ("Agreement") is made and entered into this ____ day of ____________________, 2022 ("Effective Date"), between the Community Development and Renewal Agency of Herriman City ("Agency"), a political subdivision of the State of Utah, operating under the Utah Community Reinvestment Agency Act (the "Act"; § 17C-1-101 *et seq.*, or its predecessor statutes), and GERMAIN MARINE ("Participant"). Participant and the Agency may from time to time hereinafter be referred to individually as a "Party" and collectively as the "Parties."

1. SUBJECT OF AGREEMENT

1.1. Purpose of the Agreement

The purpose of this Agreement is to (a) implement the Herriman North Community-Community Reinvestment Project Area Plan (the "Project Area Plan") as adopted by the Agency, by providing for the development of an auto mall on approximately 68 acres of real proeprty, as more particularly described below, located in the City of Herriman, Utah, comprising the Herriman North Community-Community Reinvestment Project Area ("Project Area"), and (b) specify the terms and conditions pursuant to which the Agency and Participant will cooperate in bringing about this objective, including the funds the Agency will provide to assist in the development of the Project Area.

1.2. Agreement in the Best Interests of the City and Residents

This Agreement is in the vital and best interests of the City of Herriman, Utah ("City") and the health, safety and welfare of its residents, and in accord with public purposes. This Agreement is carried out pursuant to the Act.

1.3. The Project Area

The Project Area is located within the boundaries of the City and legally described in the Project Area Plan.

1.4. The Project Area Plan and Budget

This Agreement is subject to the provisions of the Project Area Plan, as approved and adopted on ____________, 2020, by the City Council of the City, in Ordinance No. 20-___, and the budget adopted by the Agency for the Project Area.

1.5. Interlocal Agreement

The Agency has entered into an Interlocal Agreement with the City, which has been amended and may be amended from time to time, to pay to the Agency certain sales tax amounts for purposes of funding part of the costs of development for the Project Area (the Interlocal Agreement along with any Amendments thereto are collectively the "Sales Tax Interlocal Agreement"). The Sales Tax Interlocal Agreement is attached to this Agreement as **Exhibit A**. As described in the Sales Tax Interlocal Agreement, sales occurring within the boundaries of the City are currently subject to a one (1) percent sales tax ("Local Sales Tax") per Title 59, Chapter 12, Part 2 of the Utah Code, the Local Sales and Use Tax Act, and more particularly per UTAH CODE § 59-12-204. Approximately fifty (50) percent of that one-percent tax as set forth in UTAH CODE § 59-12-205(2)(b) is based on the transaction occurring within the boundaries of the City. Pursuant to UTAH CODE § 17C-5-204 and UTAH CODE § 11-13-215, the City has agreed and consented that the Agency shall be paid a portion of the point-of-sale tax generated by sales attributable to the Site (defined below and described in the attached **Exhibit B**) (the fifty percent paid to the Agency is referred to herein as "Point-of-sale Tax" or "POST"). Pursuant to the Sales Tax Interlocal Agreement, the Agency is entitled to receive up to seventy percent (70%) of the POST for a period beginning on the date requested by Agency and ending fifteen (15) years after the date of the Agency request ("Sales Tax Rebate").

1.6. The Site and the Facility

Participant intends to develop an auto mall and other commercial retail within the Project Area ("Facility"). The Facility shall be located on approximately the portion of the Project Area shown on Exhibit B ("Site"). The Facility means the cost of public infrastructure as identified on **Exhibit C**, real property acquisition within the Project Area, and incentives to participants, developers, or auto dealers located in the Project Area.

1.7. The Incentive

As used in this Agreement, the term “Incentive” means one hundred percent (100%) of the Sales Tax Rebate *after* (i) satisfaction of the City’s obligations pursuant to that certain Settlement Agreement of Condemnation Action dated February 11, 2019 by and among Roger H. Furse, Dennis E. Furse, Janna F. Anderson, Chad B. Buehler, Jillene Buehler, Dian Thomas, trustee of the 1996 Dian Thomas Trust, Carolee H. Hepner, Trustee of the William Beckstead Trust, and Butterfield Commercial, LLC and the City; and (ii) the Agency’s allocation and set aside of ten percent (10%) of the Sales Tax Rebate for housing as required by UTAH CODE § 17C-5-307.

1.8. Parties to the Agreement

1.8.1. The Agency

The Agency is a public body, corporate and politic, exercising governmental functions and powers, and organized and existing under the Act. The address of the Agency is stated in Section 6.2 below.

1.8.2. The Participant

Participant is______________________________, a Utah limited liabilty company. The address of Participant is stated in Section 6.2 below.

1.9. Prohibition against Certain Changes

1.9.1. Acknowledgement by Participant

Participant acknowledges the importance of the development of the Project Area to the general welfare of the community, the public assistance set forth in this Agreement that has been made available by law and by the Agency for the purpose of making the investment within the Project Area possible, that a significant change in the identity of Participant, as prohibited by this Section 1.9.1, may be considered, for practical purposes, a transfer or disposition of the Facility, the qualifications and identity of Participant are of particular concern to the Agency, and that it is because of such qualifications and identity that the Agency is entering into this Agreement with Participant.

1.9.2. Representation as to Investment Intent

Participant represents and agrees that its investment in and use of the Site and Participant’s other undertakings reflected in this Agreement are and shall only be for the purpose of Participant’s development of the Facility and not for speculation in land holding or otherwise.

1.9.3. Assignment or Transfer of Agreement

Participant represents and agrees for itself and its successors and assigns that, during the term of this Agreement and except as set forth in the following sentence, Participant will not assign or transfer or attempt to assign or transfer all or any part of this Agreement, or any rights herein or obligations hereunder, during the term of this Agreement except as explicitly allowed herein or as agreed to in a writing signed by the Parties.

The foregoing notwithstanding, Participant may transfer its rights and obligations under this Agreement to any of its subsidiaries or affiliates without the Agency’s prior written approval during the term of this Agreement so long as the Facility continues to operate as described in this Agreement.

The attempted or actual assignment or delegation of this Agreement in violation of the above provisions is a material Default that shall be subject to the provisions of Article 5 of this Agreement.

For purposes of this Section 1.9.3, the term “subsidiaries” shall mean those companies or entities in which Participant both holds an ownership stake of more than 50 percent and over which Participant is able to exert control and the term “affiliates” shall mean those companies in which the owner of Participant both holds an ownership stake of more than 50 percent and over which the owner of Participant is able to exert control. Additionally, and for purposes of this Section, “control” (and its correlative meanings, “controlled by” and “under common control with”) shall mean possession, directly or indirectly, or power to direct or cause the direction of management or policies (whether through ownership of securities or partnership or other ownership interests, by contract or otherwise).

1.9.4. Transfer to Tax-Exempt Organization

Notwithstanding anything in this Agreement to the contrary, any attempt by Participant or its successor(s) in interest to transfer the Site or any of the personal property within the Site to a tax-exempt organization or otherwise to exempt any of the property within the Project Area from *ad valorem* property taxation without the prior written consent of the Agency will entitle the Agency, at its sole discretion, to immediately and without prior notice terminate this Agreement and cease further payments under this Agreement to Participant or its successors or assigns.

1.9.5. Continuing Obligations

Any permitted assignment or transfer of this Agreement, in whole or in part, shall relieve Participant from any and all obligations under this Agreement; provided, however, that the assignee has accepted the assignment and assumed all duties, obligations and liabilities of Participant under this Agreement in writing. Except as otherwise provided herein, all of the terms, covenants, and conditions of this Agreement are and will remain binding upon Participant and its successors and assigns until the expiration or termination of this Agreement.

2. OBLIGATIONS OF THE PARTIES

2.1. Payment of Incentive

2.1.1. Payment Obligation

So long as Participant fulfills all of its obligations under this Agreement, the Agency will pay to Participant the Incentive as described herein. The Agency expects to receive the monthly Sales Tax Rebate approximately one month and twenty days after the end of the calendar month for which the sales taxes were paid (e.g., the Agency expects to receive August payment of the Sales Tax Rebate by October 20). After the end of the calendar month for which the Agency is collecting the Sales Tax Rebate, the contemplated payment of the Incentive shall be made by the Agency within fifteen (15) days after the date on which all of the conditions precedent as set forth in Section 2.3 have been met.

2.1.2. Sales Tax Rebate Payments

The Agency is entitled to receive the Sales Tax Rebate beginning on the date first requested by the Agency. Such Sales Tax Rebate shall continue for a period of not greater than fifteen (15) years from the date which Participant first receives the Incentive as described herein or until such time as the Agency has paid to the Participant, its designated affiliate, or assignees as permitted herein, the total amount of $1,500,000.00 (the "Incentive Cap").

2.1.3. Distribution of Incentive to Participant

Participant shall be entitled to receive up to $1,500,000.00 of Incentive for a new Marine and Boat dealership, that is constructed and operated on Participant's property located at the Site.

2.1.4. Distribution of Incentive to Assignees

The Parties hereto acknowledge that H.B. 151 (2022) amended the Agency's ability to enter into agreements for retail facility incentives. Accordingly, the Parties intend to establish parameters under which a portion of the Incentive Cap contemplated herein may be assigned by the Participant when the Participant recruits additional retail users to the Site. If Participant brings any uses to the Site which are permitted or conditional under the City's current land use ordinances or a development agreement applicable to the Site (collectively the "Permitted Uses"), and the Permitted Uses are actually constructed and operational on the Site, then Participant may assign a portion of the incentive according to the conditions and parameters set forth in this Section.

2.2. Sole Source of Funding for the Incentive

The entirety of Incentive contemplated in this Agreement will be funded solely by the Sales Tax Rebate payments received by the Agency during the term of this Agreement and pursuant to the Sales Tax Interlocal Agreement. Participant is not, and shall not be, entitled to any other funds collected by the Agency for the Project Area, including other sales taxes, property taxes, or current or future interlocal agreements, or any other funds held by the Agency.

2.3. Conditions Precedent to the Payment of the Incentive to Participant

In addition to other provisions in this Agreement, the Agency has no obligation to remit to Participant the Incentive unless and until all the following conditions precedent, as detailed in the following subsections, are satisfied:

2.3.1. Agency is Entitled to Receive the Sales Tax Rebate

The Agency is not obligated to pay to Participant any of the Incentive unless the Agency is legally entitled to receive the Sales Tax Rebate pursuant to the Sales Tax Interlocal Agreement.

2.3.2. Agency has Actually Received the Sales Tax Rebate Payment

The Agency is obligated to pay to Participant the Incentive only to the extent the Agency has actually received the Sales Tax Rebate payment(s) for the particular calendar month. Participant agrees and acknowledges that the calculation of payments of the Sales Tax Rebate pursuant to the Sales Tax Interlocal Agreement may require information about taxable sales occurring at the Facility from Participant, its assignees as permitted herein, or from the Utah State Tax Commission. Participant agrees to take such actions as reasonably necessary to provide the Agency with information reasonably necessary to allow the City and the Agency to calculate the amount of the Sales Tax Rebate pursuant to this Agreement and in compliance with the Sales Tax Interlocal Agreement.

2.3.3. Continued Operation of the Facility

The Agency is not obligated to pay to Participant or its permitted assignees the Incentive until the Participant and/or its assignees has continuously operated (defined in Section 2.10) the Facility for the entire month for which payment of the Incentive is being sought.

2.4. Effect of Failure to Meet Conditions Precedent to Payment of Incentive

In the event that the conditions precedent as described in Section 2.3 are not met for any given calendar month during the term of this Agreement, and Participant is thus not entitled to receive the Incentive attributable to that calendar month, but is otherwise not in default under this Agreement, such failure shall not constitute a Default under this Agreement. Such failure shall result in the forfeiture by Participant of the Incentive for that particular calendar month.

2.5. Limitations on Incentive

The Incentive term shall begin either on (1) the issuance of the first certificate of occupancy for an auto dealership within the Facility, or (2) the date requested by Agency, and shall end fifteen (15) years thereafter (the "Incentive Term").

Participant further acknowledges that the Incentive paid by the Agency to Participant under this Agreement is limited by the Incentive Term and the amount of Sales Tax Rebate actually received by the Agency. Participant further acknowledges that the Agency does not guarantee that Participant will receive a minimum dollar amount during the Incentive Term. The amount of Sales Tax Rebate generated by the Facility is determined by taxable sales occurring at the Facility.

Notwithstanding all other provisions in this Agreement, the Agency is not obligated to pay to Participant in any one calendar month more than the Incentive attributable to such calendar month.

The Agency shall not support any modification or amendment to the Sales Tax Interlocal Agreement that would reduce, on a percentage basis, the amount of Incentive that Participant is entitled to receive under this Agreement or the term during which Participant is entitled to receive the Incentive.

2.6. Payment of Taxes

During the term of this Agreement, to the extent applicable, Participant and any of its successors-in-interest in any portion of the Site or Facility agree to pay, prior to delinquency, all undisputed real property and other *ad valorem* taxes and assessments assessed against any portion of the Site or Facility or any other taxable property, including personal property, located within the Facility to the extent owned by Participant or any of its successors-in-interest; provided, however, that Participant expressly retains any and all rights to: (a) challenge, object to, or appeal any real property or personal property and other *ad valorem* taxes and assessments; and (b) petition for the reduction thereof.

2.7. Reduction or Elimination of Incentive

The Parties agree that Participant assumes and accepts the risk of possible alteration of Federal or State statute, regulation, or adjudication rendering unlawful or impractical the collection, receipt, disbursement, or application of the Incentive to the Agency as contemplated in and by this Agreement. If the provisions of Utah law which govern the payment of the Incentive to the Agency are changed or amended so as to reduce or eliminate the amount paid to the Agency under the Sales Tax Interlocal Agreement, the Agency's obligation to pay Participant annually the Incentive, as applicable, will be proportionately reduced or eliminated, but only to the extent necessary to comply with the changes in such law. Participant agrees and acknowledges that it has made such investigations as necessary and assumes all risk as to whether the Project Area, the Plan, the Budget, the Sales Tax Interlocal Agreement, and this Agreement were properly approved, adopted, executed, and made effective. Notwithstanding any change in law, Participant specifically reserves and does not waive any right it may have to challenge, at Participant's cost and expense, the constitutionality of any law change(s) that would reduce or eliminate the payment of Incentive to the Agency and/or Participant and nothing herein shall be construed as an estoppel, waiver or consent to reduce or eliminate payment of the Incentive to the Agency and/or Participant. Participant acknowledges, understands, and agrees that the Agency is under no obligation to challenge the validity, enforceability, or constitutionality of a change in law that reduces or eliminates the payment of Incentive to the Agency and/or Participant, or to otherwise indemnify or reimburse Participant for its actions to independently do so.

2.8. Declaration of Invalidity

In the event any legal action is filed in a court of competent jurisdiction that seeks to invalidate the Project Area or this Agreement or that otherwise seeks to or would have the possible result of reducing or eliminating the payment of the Incentive to the Agency, the Agency shall provide written notice of such legal action to Participant. In the event such an action is filed, the Agency shall have no obligation to challenge that action or defend itself against such action. Participant specifically reserves and does not waive any right it may have to intervene, at Participant's cost and expense, in any such legal action and challenge the basis for any causes of action or any remedy sought that would reduce or eliminate the payment of the Incentive to the Agency and/or Participant, and nothing herein shall be construed as an estoppel, waiver or consent to reduce or eliminate payment of the Incentive to the Agency and/or Participant. In the event that the court declares that the Agency cannot receive the Incentive, invalidates the Project Area or this Agreement, or takes any other action which eliminates or reduces the amount of Incentive paid to the Agency, and the grounds for the legal determination cannot reasonably be addressed by the Agency, the Agency's obligation to annually pay to Participant the Incentive in accordance with this Agreement will be reduced or eliminated to the extent that the Incentive is not received by the Agency.

2.9. Dispute over Receipt of Payment of the Incentive

In the event a dispute arises as to the person or entity entitled to receive the Incentive under this Agreement due to a claimed assignment or claimed successor-in-interest to the Incentive or otherwise, the Agency may withhold payment of the Incentive and may refrain from taking any other action required of it by this Agreement until the dispute is resolved either by agreement or by a court of competent jurisdiction and sufficient evidence of such resolution is provided to the Agency. The Agency shall be entitled to deduct from its payment of the Incentive any costs or expenses, including reasonable attorney fees, incurred by the Agency due to the dispute, except in the instance that the dispute arises due to the act, error or omission of the Agency, in which case the Agency shall be responsible for all costs and expenses including reasonable and actual attorney fees.

2.10. Nature of Participant's Obligations and Limitation

To qualify to receive the Incentive as set forth herein, Participant shall fulfill all of its obligations as set forth in this Agreement. The failure of Participant to fulfill its obligations may result in a failure to qualify to receive the Incentive or termination of this Agreement but shall not give rise to any other right or remedy in favor of the Agency.

2.11. Development of the Facility

Participant shall develop the Facility in a commercially reasonable manner substantially similar to other auto malls.

2.12. Commencement of Development

Development of the Facility as described in Section 2.12 shall begin as soon as reasonably possible. If Participant fails to develop the Facility as required by this Section for any reason other than events of force majeure, the Agency shall have the right to terminate this Agreement upon written notice to Participant, subject, however, to any notice and cure periods set forth in Article 5.

The Parties understand and agree that funding for the Facility comes entirely from Participant's internal capital or from financing obtained by Participant. The Agency shall not be liable or responsible for providing, obtaining, or guaranteeing such financing.

2.13. Potential Shortfall

Participant agrees and acknowledges that the only funds available to the Agency for compensation or incentives to Participant are those funds received by the Agency under the Sales Tax Interlocal Agreement and that the amount of Incentive paid to Participant under this Agreement is dependent on the taxable sales occurring within the Site.

2.14. Audits, Appeals, and Reassessments

In the event that the Utah State Tax Commission or other court or governmental entity with jurisdiction (a "Tax Authority") finds that Participant owes additional sales taxes for taxable sales occurring at the Facility, the Agency shall have no obligation to pay the Incentive for such additional amounts. In the event that a Tax Authority finds that Participant overreported or overpaid sales taxes for sales occurring at the Facility, Participant shall immediately pay to the Agency the portion of the Incentive attributable to such overage.

3. ADDITIONAL TERMS

3.1. Investment

Participant will at all times be responsible for its investment at the Facility. Recognizing the level of investment by Participant, the Agency has determined that it is in the best interests of the residents of the City to provide the Incentive to Participant to develop and operate the Facility as contemplated in this Agreement.

3.2. Responsibility for Development Plans and Permits

The Agency shall not have any responsibility to obtain permits, licenses, or other approvals for Participant's development or operation of the Facility.

3.3. Other Terms

3.3.1. City Land Use Authority

Participant acknowledges that nothing in this Agreement shall be deemed to supersede, waive, or replace the City's authority over land use, zoning, and permitting within the City.

3.3.2. Restriction Against Parcel Splitting

If applicable, during the term of this Agreement, Participant shall not, without the prior written approval of the Agency, (a) convey its interest in the Site or any portion thereof, if any, in such a way that a parcel of real property would extend outside the Project Area, or (b) construct or install any building or structure within the Project Area in such a way that any portion of the Facility or structure would extend outside of the Project Area. Participant understands and acknowledges that these requirements are intended to avoid the splitting of any parcels of real property within the Project Area and to avoid the joining of any parcels of real property inside of the Project Area with parcel(s) outside of the Project Area in such a way that Salt Lake County could no longer identify the periphery of the Project Area by distinct parcels.

3.3.3. Deannexation

Participant agrees that it will not cooperate with any person, group, or municipality in any effort to remove, deannex, disconnect, or disincorporate the Site or any portion thereof from the City during the Incentive Term. In the event that the Site or a portion thereof is disconnected, deannexed, disincorporated, or otherwise removed from the municipal boundaries of the City, the Agency's obligations to pay the Incentive for that portion of the Site outside of the City shall immediately cease.

3.3.4. Indemnification

Participant agrees to and shall indemnify, defend, and hold the Agency and its directors, officers, agents, employees, and representatives harmless from and against all liability, loss, damage, costs, or expenses (including reasonable attorney fees and court costs) arising from or as a result of the death of any person, or any accident, injury, loss, or damage whatsoever caused to any third party person or to the property of any third party person, directly or indirectly caused by any acts done or any errors or omissions of Participant or its directors, officers, agents, employees, consultants, and contractors on the Facility or the Site except for willful misconduct or negligent acts or omissions of the Agency, the City, or their respective directors, officers, agents, employees, contractors, and consultants. Likewise, the Agency agrees to and shall indemnify, defend, and hold Participant and its directors, officers, agents, employees, and representatives harmless from and against all liability, loss, damage, costs, or expenses (including reasonable attorneys' fees and court costs) arising from or as a result of the death of any person, or any accident, injury, loss, or damage whatsoever caused to any third party person or to the property of any third party person, directly or indirectly caused by any acts done or any errors or omissions of the Agency, the City, or their respective directors, officers, agents, employees, contractors and consultants except for willful misconduct or negligent acts or omissions of Participant or its directors, officers, agents, employees, consultants, and contractors.

3.3.5. Limits on Liability

In no event shall one Party be liable to the other(s) for consequential, special, incidental, indirect, exemplary, or punitive damages of any kind (including, but not limited to, loss of profits, loss of reputation, or loss of current or prospective business advantage, even where such losses are characterized as direct damages) arising out of or in any way related to the relationship or dealings between Participant and the Agency, regardless of whether the claim under which damages are sought is based upon contract, tort, negligence (of any kind), willful misconduct, strict liability or otherwise, and regardless of whether the parties have been advised of the possibility of such damages at the time of contracting or otherwise.

3.3.6. Local, State, and Federal Laws

Participant shall develop and operate the Facility in conformity with all applicable laws; provided, however, that unless otherwise addressed elsewhere in this Agreement, nothing herein shall limit the right of Participant to properly challenge any such law or the applicability of such law.

3.3.7. Rights of Access

Representatives of the Agency shall have the right of reasonable access to the Facility for purposes of inspection, with reasonable and prior written notice (but in no event less than 48 hours prior), and without charges or fees, during normal business hours or as otherwise agreed to in writing by Participant, subject, however, to the rules, regulations, security protocols and other access limitations for safety and security purposes as required by Participant or by the owner or operator of the Facility. The Agency agrees to and shall indemnify and hold Participant harmless from and against all liability, loss, damage, costs, or expenses arising from or as a result of the death of any person or any accident, injury, loss or damage whatsoever caused to any person or the property of any person which shall occur as a result of or arising from the Agency's or the City's, or their respective directors, officers, agents, employees, contractors and consultants, entry upon or activities on the Site or in the Facility, except that this indemnity shall not apply to the sole negligence or willful misconduct of Participant.

3.3.8. Responsibility of the Agency

The Agency shall not have any obligation under this Agreement other than those specifically provided for herein. Except as expressly provided for in this Agreement, nothing herein shall be construed as requiring the Agency to pre-approve or prejudge any matter, or as otherwise binding the Agency's discretion or judgment on any issue prior to an appropriate hearing (if required), review, or compliance with any other requirement.

3.3.9. Non-waiver of Governmental Immunity

Nothing in this Agreement shall be construed as a waiver of any immunity, protection, or rights granted to the Agency under the Governmental Immunity Act of Utah, Utah Code 63G-7-101, *et seq*.

4. EFFECT AND DURATION OF COVENANTS; TERM OF AGREEMENT

The covenants, including but not limited to conformance with federal, local, and state laws, established in this Agreement shall, without regard to technical classification and designation, be binding on the Parties and any successors-in-

interest for the benefit of each of the respective Parties, their successors and assigns during the term of this Agreement, which shall terminate upon the later of: (a) the final payment of the Incentive during or upon the expiration of the Incentive Term as set forth in Article 2 of this Agreement; or (b) upon the written agreement signed by the Parties hereto.

5. DEFAULTS, REMEDIES, AND TERMINATION

5.1. Default

If either the Agency or Participant fails to perform or delays performance of any material obligation of this Agreement and fails to cure as provided for in this Article 5, such conduct constitutes a default of this Agreement ("Default"). The Party in default must immediately commence to cure, correct, or remedy such failure or delay and shall complete such cure, correction, or remedy within the periods provided in Section 5.3 hereof.

5.2. Notice

If a Default under this Agreement occurs, the non-defaulting Party shall give written notice pursuant to Section 6.2 below (a "Default Notice") of the Default to the defaulting Party, specifying the nature of the Default. Failure or delay in giving such notice shall not constitute a waiver of any Default, nor shall it change the time of Default, nor shall it operate as a waiver of any rights or remedies of the non-defaulting Party; but the non-defaulting Party shall have no right to exercise any remedy hereunder without delivering the Default Notice as provided herein. Delays by either Party in asserting any of its rights and remedies shall not deprive the other Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any such rights or remedies.

5.3. Cure Period

The non-defaulting Party shall have no right to exercise a right or remedy hereunder unless the subject Default continues uncured for a period of thirty (30) days after delivery of the Default Notice with respect thereto, or, where the default is of a nature which cannot be cured within such thirty (30) day period, the defaulting Party fails to commence such cure within thirty (30) days and to diligently proceed to complete the same. A Default which can be cured by the payment of money is understood and agreed to be among the types of defaults which can be cured within thirty (30) days. If the Default is not cured, or commenced to be cured if such default is of a nature which cannot be cured within thirty (30) days, by such Party within thirty (30) days of delivery of the Default Notice, such failure to cure shall be an Event of Default, and the non-defaulting Party may pursue such other rights and remedies as it may have, except, however, if Participant fails to commence or continue Operations as required by Sections 2.10 and 2.11, above, then in such case Agency's sole remedy shall be to terminate this Agreement (for clarity, Agency may not commence an action against Participant for specific performance to commence or continue Operations). Further, in the event of a Default by Participant, past all applicable cure periods, Agency's sole remedy shall be to terminate this Agreement.

5.3.1. Rights and Remedies

Upon the occurrence of a Default (following the expiration of the applicable cure period provided herein or by law, whichever is longer), the non-defaulting Party shall have all remedies provided for in this Agreement and shall have the right to obtain specific performance, unless otherwise limited by the express remedies set forth in this Agreement. Such remedies are cumulative, and the exercise of one or more of such rights or remedies shall not preclude the exercise, at the same or different times, of any other rights or remedies for the same Default or any other Default by the defaulting Party.

5.3.2. Legal Actions

5.3.2.1. Venue

All legal actions between the Parties, arising under this Agreement, shall be conducted exclusively in the Third District Court for the State of Utah located in Salt Lake County, Utah, unless they involve a case with federal jurisdiction, in which case they shall be conducted exclusively in the Federal District Court for the District of Utah.

5.3.2.2. Service of Process

Service of process on the Agency shall be made by personal service upon the Chairman or Executive Director of the Agency or in such other manner as may be provided by law. Service of process on Participant shall be by personal service upon its Registered Agents, or in such other manner as may be provided by law, whether made within or without the State of Utah.

5.3.2.3. Applicable Law

The laws of the State of Utah shall govern the interpretation and enforcement of this Agreement.

6. GENERAL PROVISIONS

6.1. Authority

Each Party hereby represents and warrants to the other that the following statements are true, complete, and not misleading as regards to the representing and warranting party: (a) such Party has full authority to enter into this Agreement and to perform all of its obligations hereunder; (b) those executing this Agreement on behalf of each Party do so with the full authority of the Party each represents; (c) this Agreement constitutes a legal, valid, and binding obligation of each Party, enforceable in accordance with its terms.

6.2. Notices, Demands, and Communications between the Parties

Formal notices, demands, and communications between the Agency and Participant shall be sufficiently given if emailed and: (1) personally delivered; or (2) if dispatched by registered or certified mail, postage prepaid, return-receipt requested, to the principal offices of the Agency and Participant, as designated in Sections 1.8.1 and 1.8.2 hereof. Such written notices, demands, and communications may be sent in the same manner to such other addresses as either Party may from time to time designate by formal notice hereunder. Delivery of notice shall be complete upon mailing or making physical delivery of the writing to the following as outlined above:

IF TO PARTICIPANT:	Herriman 73 Partners LLC Attn: Lawrence Myler 10771 South Rippling Bay South Jordan, Utah 84009 Email: lj@larrymylar.com
IF TO AGENCY:	Redevelopment Agency of Herriman City Attn: Chairman or Executive Director 5355 West Herriman Main Street, Herriman, Utah 84096
With a copy to:	City Attorney 5355 West Herriman Main Street Herriman, Utah 84096

6.3. Severability

In the event that any condition, covenant or other provision herein contained is held to be invalid or void by a court of competent jurisdiction, the same shall be deemed severable from the remainder of this Agreement and shall in no way affect any other covenant or condition herein contained unless such severance shall have a material effect on the terms of this Agreement. If such condition, covenant, or other provision shall be deemed invalid due to its scope, all other provisions shall be deemed valid to the extent of the scope or breadth permitted by law.

6.4. Nonliability of Officials and Employees

No director, officer, agent, employee, representative, contractor, attorney, or consultant of the Parties hereto shall be personally liable to any other Party hereto, or any successor-in-interest thereof, in the event of any Default or breach by a Party hereto or for any amount which may become due to a Party hereto or to its successor, or on any obligations under the terms of this Agreement.

6.5. Enforced Delay; Extension of Time and Performance

In addition to the specific provisions of this Agreement, performance by either Party hereunder shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, lock-outs, riots, floods, earthquakes, fires, casualties, acts of God, acts of a public enemy, terrorist activity, epidemics, quarantine restrictions, freight embargoes, lack of transportation, unusually severe weather, or any other causes beyond the reasonable control or without the fault of the Party claiming an extension of time to perform. An extension of time for any such cause shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if notice by the Party claiming such extension is sent, whether on the part of the Agency's Executive Director or its governing board or on the part of Participant, to the other Party within thirty (30) days of actual knowledge of the commencement of the cause. Time of performance under this Agreement may also be extended in writing by the Agency and Participant by mutual agreement.

6.6. Approvals

Whenever the consent or approval is required of any Party hereunder, except as otherwise herein specifically provided, such consent or approval shall not be unreasonably withheld or delayed.

6.7. Time of the Essence

Time shall be of the essence in the performance of this Agreement.

6.8. Attorney Fees

In the event of any litigation arising from or related to this Agreement, the prevailing Party shall be entitled to recover from the non-prevailing party all reasonable costs and attorney fees related to such litigation.

6.9. Interpretation

The Parties hereto agree that they intend by this Agreement to create only the contractual relationship established herein, and that no provision hereof, or act of either Party hereunder, shall be construed as creating the relationship of principal and agent, or a partnership, or a joint venture, or an enterprise between the Parties hereto.

6.10. No Third-Party Beneficiaries

It is understood and agreed that this Agreement shall not create for either Party any independent duties, liabilities, agreements, or rights to or with any third party, nor does this Agreement contemplate or intend that any benefits hereunder accrue to any third party.

6.11. Mediation

In the event a dispute arises between the parties with respect to the terms of this Agreement or the performance of any contractual obligation by one or both of the parties, the parties agree to submit the matter to formal and confidential non-binding mediation before any judicial action may be initiated, unless an immediate court order is needed or a statute of limitations period will run before mediation can be reasonably completed. A mediator will be selected by mutual agreement of the parties. The parties must mediate in good faith to resolve the dispute in a timely manner. Each party will be responsible for its own costs and one-half of the cost of the mediator. The place of mediation shall be Herriman, Utah.

6.12. Headings

Article and Section titles, headings or captions are inserted only as a matter of convenience and for reference and in no way define, limit, extend, or describe the scope of this Agreement or the intent of any provision hereof.

6.13. Contra Proferentem

This is an arm's-length Agreement: The Parties have read this Agreement and have executed it voluntarily after having been apprised of all relevant information and the risks involved and having had the opportunity to obtain legal counsel of their choice. Consequently, no provision of this Agreement shall be strictly construed against either Party.

6.14. Further Assurances

The Parties shall cooperate, take such additional actions, sign such additional documentation, and provide such additional information as reasonably necessary to accomplish the objectives set forth in this Agreement.

6.15. Incorporation of Recitals and Exhibits

All recitals and exhibits attached hereto are incorporated into this Agreement as if fully set forth herein.

6.16 Governmental Records And Management Act

The Agency acknowledges that Participant considers all of the information provided to the Agency in connection with this Agreement is protected under the Utah Governmental Records Access and Management Act, § 63-2-101 *et seq.* under a claim of "business confidentiality" so long as Participant complies with the applicable requirements in making a claim of business confidentiality under § 63G-2-309(1)(a)(i)(A) & (B).

7. DUPLICATION, INTEGRATION, WAIVERS, AND AMENDMENTS

7.1. Duplicate Originals

This Agreement may be executed in duplicate originals, each of which shall be deemed an original. Electronic pdf signatures shall be considered original signatures.

7.2. Integration

This Agreement (including its exhibits) constitutes the entire understanding and agreement of the Parties regarding the subject matter thereof. When executed by the Parties, this Agreement integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the Parties with respect to the subject matter thereof.

7.3. Waivers and Amendments

All waivers of the provisions of this Agreement must be in writing. This Agreement and any provisions hereof may be amended only by mutual written agreement between Participant and the Agency.

[signatures on following page]

COMMUNITY DEVELOPMENT AND RENEWAL AGENCY OF HERRIMAN CITY

____

LORIN PALMER, Chair

ATTEST

____

JACKIE NOSTROM, Secretary

____

Attorney for Agency
Approved as to form and legality

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

In the County of Salt Lake, State of Utah, on this _____ day of _______________________________, 2020, before me, the undersigned notary, personally appeared Lorin Palmer and Jackie Nostrom , the Chair and the Secretary, respectively, of the Community Development and Renewal Agency of Herriman City, who are personally known to me or who proved to me their identities through documentary evidence to be the persons who signed the preceding document in my presence and who swore or affirmed to me that their signatures are voluntary.

____

NOTARY

Signature ____

Name ____

Title ____

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

In the County of Salt Lake, State of Utah, on this _____ day of _________________________, 2020, before me, the undersigned notary, personally appeared ____, the _____________________________ of , a Utah limited liability company, who is personally known to me or who proved to me his/her identity through documentary evidence to be the person who signed the preceding document in my presence and who swore or affirmed to me that his/her signature is voluntary.

____
NOTARY

Exhibit A

to Participation Agreement

Sales Tax Interlocal Agreement

Exhibit B

to Participation Agreement

Site Plan

Exhibit C
to Participation Agreement

Public Infrastructure

PARTICIPATION AGREEMENT

Between

THE COMMUNITY DEVELOPMENT AND RENEWAL AGENCY OF HERRIMAN CITY

And

T. JOHNSON MANAGEMENT LLC

TABLE OF CONTENTS

This Participation Agreement ("Agreement") is made and entered into this ____ day of ____________________, 2022 ("Effective Date"), between the Community Development and Renewal Agency of Herriman City ("Agency"), a political subdivision of the State of Utah, operating under the Utah Community Reinvestment Agency Act (the "Act"; § 17C-1-101 *et seq.*, or its predecessor statutes), and T. Johnson Management LLC, a Utah limited liability company ("Participant"). Participant and the Agency may from time to time hereinafter be referred to individually as a "Party" and collectively as the "Parties."

1. SUBJECT OF AGREEMENT

1.1. Purpose of the Agreement

The purpose of this Agreement is to (a) implement the Herriman North Community-Community Reinvestment Project Area Plan (the "Project Area Plan") as adopted by the Agency, by providing for the development of an auto mall on approximately 68 acres of real proeprty, as more particularly described below, located in the City of Herriman, Utah, comprising the Herriman North Community-Community Reinvestment Project Area ("Project Area"), and (b) specify the terms and conditions pursuant to which the Agency and Participant will cooperate in bringing about this objective, including the funds the Agency will provide to assist in the development of the Project Area.

1.2. Agreement in the Best Interests of the City and Residents

This Agreement is in the vital and best interests of the City of Herriman, Utah ("City") and the health, safety and welfare of its residents, and in accord with public purposes. This Agreement is carried out pursuant to the Act.

1.3. The Project Area

The Project Area is located within the boundaries of the City and legally described in the Project Area Plan.

1.4. The Project Area Plan and Budget

This Agreement is subject to the provisions of the Project Area Plan, as approved and adopted on ____________, 2020, by the City Council of the City, in Ordinance No. 20-___, and the budget adopted by the Agency for the Project Area.

1.5. Interlocal Agreement

The Agency has entered into an Interlocal Agreement with the City, which has been amended and may be amended from time to time, to pay to the Agency certain sales tax amounts for purposes of funding part of the costs of development for the Project Area (the Interlocal Agreement along with any Amendments thereto are collectively the "Sales Tax Interlocal Agreement"). The Sales Tax Interlocal Agreement is attached to this Agreement as **Exhibit A**. As described in the Sales Tax Interlocal Agreement, sales occurring within the boundaries of the City are currently subject to a one (1) percent sales tax ("Local Sales Tax") per Title 59, Chapter 12, Part 2 of the Utah Code, the Local Sales and Use Tax Act, and more particularly per UTAH CODE § 59-12-204. Approximately fifty percent (50%) of that one-percent (1%) tax as set forth in UTAH CODE § 59-12-205(2)(b) is based on the transaction occurring within the boundaries of the City. Pursuant to UTAH CODE § 17C-5-204 and UTAH CODE § 11-13-215, the City has agreed and consented that the Agency shall be paid a portion of the point-of-sale tax generated by sales attributable to the Site (defined below and described in the attached **Exhibit B**) (the fifty percent paid to the Agency is referred to herein as "Point-of-sale Tax" or "POST"). Pursuant to the Sales Tax Interlocal Agreement, the Agency is entitled to receive up to seventy percent (70%) of the POST for a period beginning on the date requested by Agency and ending fifteen (15) years after the date of the Agency request ("Sales Tax Rebate").

1.6. The Site and the Facility

Participant intends to develop an auto mall and other commercial retail within the Project Area ("Facility"). The Facility shall be located on approximately the portion of the Project Area shown on Exhibit B ("Site"). The Facility means the cost of public infrastructure as identified on **Exhibit C**, real property acquisition within the Project Area, and incentives to participants, developers, or auto dealers located in the Project Area.

1.7. The Incentive

As used in this Agreement, the term "Incentive" means one hundred percent (100%) of the Sales Tax Rebate *after* (i) satisfaction of the City's obligations pursuant to that certain Settlement Agreement of Condemnation Action dated February 11, 2019 by and among Roger H. Furse, Dennis E. Furse, Janna F. Anderson, Chad B. Buehler, Jillene Buehler, Dian Thomas, trustee of the 1996 Dian Thomas Trust, Carolee H. Hepner, Trustee of the William Beckstead Trust, and Butterfield Commercial, LLC and the City; and (ii) the Agency's allocation and set aside of ten percent (10%) of the Sales Tax Rebate for housing as required by UTAH CODE § 17C-5-307.

1.8. Parties to the Agreement

1.8.1. The Agency

The Agency is a public body, corporate and politic, exercising governmental functions and powers, and organized and existing under the Act. The address of the Agency is stated in Section 6.2 below.

1.8.2. The Participant

Participant isT. JOHNSON MANAGEMENT a Utah limited liabilty company. The address of Participant is stated in Section 6.2 below.

1.9. Prohibition against Certain Changes

1.9.1. Acknowledgement by Participant

Participant acknowledges the importance of the development of the Project Area to the general welfare of the community, the public assistance set forth in this Agreement that has been made available by law and by the Agency for the purpose of making the investment within the Project Area possible, that a significant change in the identity of Participant, as prohibited by this Section 1.9.1, may be considered, for practical purposes, a transfer or disposition of the Facility, the qualifications and identity of Participant are of particular concern to the Agency, and that it is because of such qualifications and identity that the Agency is entering into this Agreement with Participant.

1.9.2. Representation as to Investment Intent

Participant represents and agrees that its investment in and use of the Site and Participant's other undertakings reflected in this Agreement are and shall only be for the purpose of Participant's development of the Facility and not for speculation in land holding or otherwise.

1.9.3. Assignment or Transfer of Agreement

Participant represents and agrees for itself and its successors and assigns that, during the term of this Agreement and except as set forth in the following sentence, Participant will not assign or transfer or attempt to assign or transfer all or any part of this Agreement, or any rights herein or obligations hereunder, during the term of this Agreement except as explicitly allowed herein or as agreed to in a writing signed by the Parties.

The foregoing notwithstanding, Participant may transfer its rights and obligations under this Agreement to any of its subsidiaries or affiliates without the Agency's prior written approval during the term of this Agreement so long as the Facility continues to operate as described in this Agreement.

The attempted or actual assignment or delegation of this Agreement in violation of the above provisions is a material Default that shall be subject to the provisions of Article 5 of this Agreement.

For purposes of this Section 1.9.3, the term "subsidiaries" shall mean those companies or entities in which Participant both holds an ownership stake of more than 50 percent and over which Participant is able to exert control and the term "affiliates" shall mean those companies in which the owner of Participant both holds an ownership stake of more than 50 percent and over which the owner of Participant is able to exert control. Additionally, and for purposes of this Section, "control" (and its correlative meanings, "controlled by" and "under common control with") shall mean possession, directly or indirectly, or power to direct or cause the direction of management or policies (whether through ownership of securities or partnership or other ownership interests, by contract or otherwise).

1.9.4. Transfer to Tax-Exempt Organization

Notwithstanding anything in this Agreement to the contrary, any attempt by Participant or its successor(s) in interest to transfer the Site or any of the personal property within the Site to a tax-exempt organization or otherwise to exempt any of the property within the Project Area from *ad valorem* property taxation without the prior written consent of the Agency will entitle the Agency, at its sole discretion, to immediately and without prior notice terminate this Agreement and cease further payments under this Agreement to Participant or its successors or assigns.

1.9.5. Continuing Obligations

Any permitted assignment or transfer of this Agreement, in whole or in part, shall relieve Participant from any and all obligations under this Agreement; provided, however, that the assignee has accepted the assignment and assumed all duties, obligations and liabilities of Participant under this Agreement in writing. Except as otherwise provided herein, all of the terms, covenants, and conditions of this Agreement are and will remain binding upon Participant and its successors and assigns until the expiration or termination of this Agreement.

2. OBLIGATIONS OF THE PARTIES

2.1. Payment of Incentive

2.1.1. Payment Obligation

So long as Participant fulfills all of its obligations under this Agreement, the Agency will pay to Participant the Incentive as described herein. The Agency expects to receive the monthly Sales Tax Rebate approximately one month and twenty days after the end of the calendar month for which the sales taxes were paid (e.g., the Agency expects to receive August payment of the Sales Tax Rebate by October 20). After the end of the quarter which the Agency is collecting the Sales Tax Rebate, the contemplated payment of the Incentive shall be made by the Agency within fifteen (15) days after the date on which all of the conditions precedent as set forth in Section 2.3 have been met.

2.1.2. Sales Tax Rebate Payments

The Agency is entitled to receive the Sales Tax Rebate beginning on the date first requested by the Agency. Such Sales Tax Rebate shall continue for a period of not greater than fifteen (15) years from the date which Participant first receives the Incentive as described herein or until such time as the Agency has paid to the Participant, its designated affiliate, or assignees as permitted herein.

2.1.3. Distribution of Incentive to Participant

Participant shall be entitled to receive up to $4,000,000.00 of Incentive for the first car dealership, as defined in Utah Code, that is constructed and operated on Participant's property located at the Site. Participant shall be entitled to receive up to an additional $4,000,000.00 of Incentive for the second car dealership that is constructed and operated on Participant's property located at the Site so long as one of the first two dealerships constructed and operated by Participant is for new car sales.

2.1.4. Distribution of Incentive to Assignees

The Parties hereto acknowledge that H.B. 151 (2022) amended the Agency's ability to enter into agreements for retail facility incentives. Accordingly, the Parties intend to establish parameters under which a portion of the Incentive Cap contemplated herein may be assigned by the Participant when the Participant recruits additional retail users to the Site. If Participant brings any uses to the Site which are permitted or conditional under the City's current land use ordinances or a development agreement applicable to the Site (collectively the "Permitted Uses"), and the Permitted Uses are actually constructed and operational on the Site, then Participant may assign a portion of the incentive according to the conditions and parameters set forth in this Section.

2.2. Sole Source of Funding for the Incentive

The entirety of Incentive contemplated in this Agreement will be funded solely by the Sales Tax Rebate payments received by the Agency during the term of this Agreement and pursuant to the Sales Tax Interlocal Agreement. Participant is not, and shall not be, entitled to any other funds collected by the Agency for the Project Area, including other sales taxes, property taxes, or current or future interlocal agreements, or any other funds held by the Agency.

2.3. <u>Conditions Precedent to the Payment of the Incentive to Participant</u>

In addition to other provisions in this Agreement, the Agency has no obligation to remit to Participant the Incentive unless and until all the following conditions precedent, as detailed in the following subsections, are satisfied:

2.3.1. Agency is Entitled to Receive the Sales Tax Rebate

The Agency is not obligated to pay to Participant any of the Incentive unless the Agency is legally entitled to receive the Sales Tax Rebate pursuant to the Sales Tax Interlocal Agreement.

2.3.2. Agency has Actually Received the Sales Tax Rebate Payment

The Agency is obligated to pay to Participant the Incentive only to the extent the Agency has actually received the Sales Tax Rebate payment(s) for the particular calendar month. Participant agrees and acknowledges that the calculation of payments of the Sales Tax Rebate pursuant to the Sales Tax Interlocal Agreement may require information about taxable sales occurring at the Facility from Participant, its assignees as permitted herein, or from the Utah State Tax Commission. Participant agrees to take such actions as reasonably necessary to provide the Agency with information reasonably necessary to allow the City and the Agency to calculate the amount of the Sales Tax Rebate pursuant to this Agreement and in compliance with the Sales Tax Interlocal Agreement.

2.3.3. Continued Operation of the Facility

The Agency is not obligated to pay to Participant or its permitted assignees the Incentive until the Participant and/or its assignees has continuously operated (defined in Section 2.10) the Facility for the entire month for which payment of the Incentive is being sought.

2.4. <u>Effect of Failure to Meet Conditions Precedent to Payment of Incentive</u>

In the event that the conditions precedent as described in Section 2.3 are not met for any given calendar month during the term of this Agreement, and Participant is thus not entitled to receive the Incentive attributable to that calendar month, but is otherwise not in default under this Agreement, such failure shall not constitute a Default under this Agreement. Such failure shall result in the forfeiture by Participant of the Incentive for that particular calendar month.

2.5. <u>Limitations on Incentive</u>

The Incentive term shall begin either on (1) the issuance of the first certificate of occupancy for an auto dealership within the Facility, or (2) the date requested by Agency, and shall end fifteen (15) years thereafter (the "Incentive Term").

Participant further acknowledges that the Incentive paid by the Agency to Participant under this Agreement is limited by the Incentive Term and the amount of Sales Tax Rebate actually received by the Agency. Participant further acknowledges that the Agency does not guarantee that Participant will receive a minimum dollar amount during the Incentive Term. The amount of Sales Tax Rebate generated by the Facility is determined by taxable sales occurring at the Facility.

Notwithstanding all other provisions in this Agreement, the Agency is not obligated to pay to Participant in any one calendar month more than the Incentive attributable to such calendar month.

The Agency shall not support any modification or amendment to the Sales Tax Interlocal Agreement that would reduce, on a percentage basis, the amount of Incentive that Participant is entitled to receive under this Agreement or the term during which Participant is entitled to receive the Incentive.

2.6. <u>Payment of Taxes</u>

During the term of this Agreement, to the extent applicable, Participant and any of its successors-in-interest in any portion of the Site or Facility agree to pay, prior to delinquency, all undisputed real property and other *ad valorem* taxes and assessments assessed against any portion of the Site or Facility or any other taxable property, including personal property, located within the Facility to the extent owned by Participant or any of its successors-in-interest; provided, however, that Participant expressly retains any and all rights to: (a) challenge, object to, or appeal any real property or personal property and other *ad valorem* taxes and assessments; and (b) petition for the reduction thereof.

2.7. <u>Reduction or Elimination of Incentive</u>

The Parties agree that Participant assumes and accepts the risk of possible alteration of Federal or State statute, regulation, or adjudication rendering unlawful or impractical the collection, receipt, disbursement, or application of the Incentive to the Agency as contemplated in and by this Agreement. If the provisions of Utah law which govern the payment of the Incentive to the Agency are changed or amended so as to reduce or eliminate the amount paid to the Agency under the Sales Tax Interlocal Agreement, the Agency's obligation to pay Participant quarterly the Incentive, as applicable, will be proportionately reduced or eliminated, but only to the extent necessary to comply with the changes in such law. Participant agrees and acknowledges that it has made such investigations as necessary and assumes all risk as to whether the Project Area, the Plan, the Budget, the Sales Tax Interlocal Agreement, and this Agreement were properly approved, adopted, executed, and made effective. Notwithstanding any change in law, Participant specifically reserves and does not waive any right it may have to challenge, at Participant's cost and expense, the constitutionality of any law change(s) that would reduce or eliminate the payment of Incentive to the Agency and/or Participant and nothing herein shall be construed as an estoppel, waiver or consent to reduce or eliminate payment of the Incentive to the Agency and/or Participant. Participant acknowledges, understands, and agrees that the Agency is under no obligation to challenge the validity, enforceability, or constitutionality of a change in law that reduces or eliminates the payment of Incentive to the Agency and/or Participant, or to otherwise indemnify or reimburse Participant for its actions to independently do so.

2.8. <u>Declaration of Invalidity</u>

In the event any legal action is filed in a court of competent jurisdiction that seeks to invalidate the Project Area or this Agreement or that otherwise seeks to or would have the possible result of reducing or eliminating the payment of the Incentive to the Agency, the Agency shall provide written notice of such legal action to Participant. In the event such an action is filed, the Agency shall have no obligation to challenge that action or defend itself against such action. Participant specifically reserves and does not waive any right it may have to intervene, at Participant's cost and expense, in any such legal action and challenge the basis for any causes of action or any remedy sought that would reduce or eliminate the payment of the Incentive to the Agency and/or Participant, and nothing herein shall be construed as an estoppel, waiver or consent to reduce or eliminate payment of the Incentive to the Agency and/or Participant. In the event that the court declares that the Agency cannot receive the Incentive, invalidates the Project Area or this Agreement, or takes any other action which eliminates or reduces the amount of Incentive paid to the Agency, and the grounds for the legal determination cannot reasonably be addressed by the Agency, the Agency's obligation to quarterly pay to Participant the Incentive in accordance with this Agreement will be reduced or eliminated to the extent that the Incentive is not received by the Agency.

2.9. <u>Dispute over Receipt of Payment of the Incentive</u>

In the event a dispute arises as to the person or entity entitled to receive the Incentive under this Agreement due to a claimed assignment or claimed successor-in-interest to the Incentive or otherwise, the Agency may withhold payment of the Incentive and may refrain from taking any other action required of it by this Agreement until the dispute is resolved either by agreement or by a court of competent jurisdiction and sufficient evidence of such resolution is provided to the Agency. The Agency shall be entitled to deduct from its payment of the Incentive any costs or expenses, including reasonable attorney fees, incurred by the Agency due to the dispute, except in the instance that the dispute arises due to the act, error or omission of the Agency, in which case the Agency shall be responsible for all costs and expenses including reasonable and actual attorney fees.

2.10. <u>Nature of Participant's Obligations and Limitation</u>

To qualify to receive the Incentive as set forth herein, Participant shall fulfill all of its obligations as set forth in this Agreement. The failure of Participant to fulfill its obligations may result in a failure to qualify to receive the Incentive or termination of this Agreement but shall not give rise to any other right or remedy in favor of the Agency.

2.11. <u>Development of the Facility</u>

Participant shall develop the Facility in a commercially reasonable manner substantially similar to other auto malls.

2.12. <u>Commencement of Development</u>

Development of the Facility as described in Section 2.12 shall begin as soon as reasonably possible. If Participant fails to develop the Facility as required by this Section for any reason other than events of force majeure, the Agency shall have the right to terminate this Agreement upon written notice to Participant, subject, however, to any notice and cure periods set forth in Article 5.

The Parties understand and agree that funding for the Facility comes entirely from Participant's internal capital or from financing obtained by Participant. The Agency shall not be liable or responsible for providing, obtaining, or guaranteeing such financing.

2.13. <u>Potential Shortfall</u>

Participant agrees and acknowledges that the only funds available to the Agency for compensation or incentives to Participant are those funds received by the Agency under the Sales Tax Interlocal Agreement and that the amount of Incentive paid to Participant under this Agreement is dependent on the taxable sales occurring within the Site.

2.14. <u>Audits, Appeals, and Reassessments</u>

In the event that the Utah State Tax Commission or other court or governmental entity with jurisdiction (a "Tax Authority") finds that Participant owes additional sales taxes for taxable sales occurring at the Facility, the Agency shall have no obligation to pay the Incentive for such additional amounts. In the event that a Tax Authority finds that Participant overreported or overpaid sales taxes for sales occurring at the Facility, Participant shall immediately pay to the Agency the portion of the Incentive attributable to such overage.

3. <u>ADDITIONAL TERMS</u>

3.1. <u>Investment</u>

Participant will at all times be responsible for its investment at the Facility. Recognizing the level of investment by Participant, the Agency has determined that it is in the best interests of the residents of the City to provide the Incentive to Participant to develop and operate the Facility as contemplated in this Agreement.

3.2. <u>Responsibility for Development Plans and Permits</u>

The Agency shall not have any responsibility to obtain permits, licenses, or other approvals for Participant's development or operation of the Facility.

3.3. <u>Other Terms</u>

3.3.1. City Land Use Authority

Participant acknowledges that nothing in this Agreement shall be deemed to supersede, waive, or replace the City's authority over land use, zoning, and permitting within the City.

3.3.2. Restriction Against Parcel Splitting

If applicable, during the term of this Agreement, Participant shall not, without the prior written approval of the Agency, (a) convey its interest in the Site or any portion thereof, if any, in such a way that a parcel of real property would extend outside the Project Area, or (b) construct or install any building or structure within the Project Area in such a way that any portion of the Facility or structure would extend outside of the Project Area. Participant understands and acknowledges that these requirements are intended to avoid the splitting of any parcels of real property within the Project Area and to avoid the joining of any parcels of real property inside of the Project Area with parcel(s) outside of the Project Area in such a way that Salt Lake County could no longer identify the periphery of the Project Area by distinct parcels.

3.3.3. Deannexation

Participant agrees that it will not cooperate with any person, group, or municipality in any effort to remove, deannex, disconnect, or disincorporate the Site or any portion thereof from the City during the Incentive Term. In the event that the Site or a portion thereof is disconnected, deannexed, disincorporated, or otherwise removed from the municipal boundaries of the City, the Agency's obligations to pay the Incentive for that portion of the Site outside of the City shall immediately cease.

3.3.4. Indemnification

Participant agrees to and shall indemnify, defend, and hold the Agency and its directors, officers, agents, employees, and representatives harmless from and against all liability, loss, damage, costs, or expenses (including reasonable attorney fees and court costs) arising from or as a result of the death of any person, or any accident, injury, loss, or damage whatsoever caused to any third party person or to the property of any third party person, directly or indirectly caused by any acts done or any errors or omissions of Participant or its directors, officers, agents, employees, consultants, and contractors on the Facility or the Site except for willful misconduct or negligent acts or omissions of the Agency, the City, or their respective directors, officers, agents, employees, contractors, and consultants. Likewise, the Agency agrees to and shall indemnify, defend, and hold Participant and its directors, officers, agents, employees, and representatives harmless from and against all liability, loss, damage, costs, or expenses (including reasonable attorneys' fees and court costs) arising from or as a result of the death of any person, or any accident, injury, loss, or damage whatsoever caused to any third party person or to the property of any third party person, directly or indirectly caused by any acts done or any errors or omissions of the Agency, the City, or their respective directors, officers, agents, employees, contractors and consultants except for willful misconduct or negligent acts or omissions of Participant or its directors, officers, agents, employees, consultants, and contractors.

3.3.5. Limits on Liability

In no event shall one Party be liable to the other(s) for consequential (other than attorney's fees as permitted in Section 6.8, below), special, incidental, indirect, or exemplary damages of any kind (including, but not limited to, loss of profits, loss of reputation, or loss of current or prospective business advantage, even where such losses are characterized as direct damages) arising out of or in any way related to the relationship or dealings between Participant and the Agency, regardless of whether the claim under which damages are sought is based upon contract, tort, negligence (of any kind), willful misconduct, strict liability or otherwise, and regardless of whether the parties have been advised of the possibility of such damages at the time of contracting or otherwise.

3.3.6. Local, State, and Federal Laws

Participant shall develop and operate the Facility in conformity with all applicable laws; provided, however, that unless otherwise addressed elsewhere in this Agreement, nothing herein shall limit the right of Participant to properly challenge any such law or the applicability of such law.

3.3.7. Rights of Access

Representatives of the Agency shall have the right of reasonable access to the Facility for purposes of inspection, with reasonable and prior written notice (but in no event less than 48 hours prior), and without charges or fees, during normal business hours or as otherwise agreed to in writing by Participant, subject, however, to the rules, regulations, security protocols and other access limitations for safety and security purposes as required by Participant or by the owner or operator of the Facility. The Agency agrees to and shall indemnify and hold Participant harmless from and against all liability, loss, damage, costs, or expenses arising from or as a result of the death of any person or any accident, injury, loss or damage whatsoever caused to any person or the property of any person which shall occur as a result of or arising from the Agency's or the City's, or their respective directors, officers, agents, employees, contractors and consultants, entry upon or activities on the Site or in the Facility, except that this indemnity shall not apply to the sole negligence or willful misconduct of Participant.

3.3.8. Responsibility of the Agency

The Agency shall not have any obligation under this Agreement other than those specifically provided for herein. Except as expressly provided for in this Agreement, nothing herein shall be construed as requiring the Agency to pre-approve or prejudge any matter, or as otherwise binding the Agency's discretion or judgment on any issue prior to an appropriate hearing (if required), review, or compliance with any other requirement.

3.3.9. Non-waiver of Governmental Immunity

Nothing in this Agreement shall be construed as a waiver of any immunity, protection, or rights granted to the Agency under the Governmental Immunity Act of Utah, Utah Code 63G-7-101, *et seq*.

4. EFFECT AND DURATION OF COVENANTS; TERM OF AGREEMENT

The covenants, including but not limited to conformance with federal, local, and state laws, established in this Agreement shall, without regard to technical classification and designation, be binding on the Parties and any successors-in-interest for the benefit of each of the respective Parties, their successors and assigns during the term of this Agreement, which shall terminate upon the later of: (a) the final payment of the Incentive during or upon the expiration of the Incentive Term as set forth in Article 2 of this Agreement; or (b) upon the written agreement signed by the Parties hereto.

5. DEFAULTS, REMEDIES, AND TERMINATION

5.1. Default

If either the Agency or Participant fails to perform or delays performance of any material obligation of this Agreement and fails to cure as provided for in this Article 5, such conduct constitutes a default of this Agreement ("Default"). The Party in Default must immediately commence to cure, correct, or remedy such failure or delay and shall complete such cure, correction, or remedy within the periods provided in Section 5.3 hereof.

5.2. Notice

If a Default under this Agreement occurs, the non-defaulting Party shall give written notice pursuant to Section 6.2 below (a "Default Notice") of the Default to the defaulting Party, specifying the nature of the Default. Failure or delay in giving such notice shall not constitute a waiver of any Default, nor shall it change the time of Default, nor shall it operate as a waiver of any rights or remedies of the non-defaulting Party; but the non-defaulting Party shall have no right to exercise any remedy hereunder without delivering the Default Notice as provided herein. Delays by either Party in asserting any of its rights and remedies shall not deprive the other Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any such rights or remedies.

5.3. Cure Period

The non-defaulting Party shall have no right to exercise a right or remedy hereunder unless the subject Default continues uncured for a period of thirty (30) days after delivery of the Default Notice with respect thereto, or, where the default is of a nature which cannot be cured within such thirty (30) day period, the defaulting Party fails to commence such cure within thirty (30) days and to diligently proceed to complete the same. A Default which can be cured by the payment of money is understood and agreed to be among the types of defaults which can be cured within thirty (30) days. If the Default is not cured, or commenced to be cured if such default is of a nature which cannot be cured within thirty (30) days, by such Party within thirty (30) days of delivery of the Default Notice, such failure to cure shall be an Event of Default, and the non-defaulting Party may pursue such other rights and remedies as it may have, except, however, if Participant fails to commence or continue Operations as required by Sections 2.10 and 2.11, above, then in such case Agency's sole remedy shall be to terminate this Agreement (for clarity, Agency may not commence an action against Participant for specific performance to commence or continue Operations). Further, in the event of a Default by Participant, past all applicable cure periods, Agency's sole remedy shall be to terminate this Agreement.

5.3.1. Rights and Remedies

Upon the occurrence of a Default (following the expiration of the applicable cure period provided herein or by law, whichever is longer), the non-defaulting Party shall have all remedies provided for in this Agreement and shall have the right to obtain specific performance, unless otherwise limited by the express remedies set forth in this Agreement. Such remedies are cumulative, and the exercise of one or more of such rights or remedies shall not preclude the exercise, at the same or different times, of any other rights or remedies for the same Default or any other Default by the defaulting Party.

5.3.2. Legal Actions

5.3.2.1. Venue

All legal actions between the Parties, arising under this Agreement, shall be conducted exclusively in the Third District Court for the State of Utah located in Salt Lake County, Utah.

5.3.2.2. Service of Process

Service of process on the Agency shall be made by personal service upon the Chairman or Executive Director of the Agency or in such other manner as may be provided by law. Service of process on Participant shall be by personal service upon its Registered Agents, or in such other manner as may be provided by law, whether made within or without the State of Utah.

5.3.2.3. Applicable Law

The laws of the State of Utah shall govern the interpretation and enforcement of this Agreement.

6. GENERAL PROVISIONS

6.1. Authority

Each Party hereby represents and warrants to the other that the following statements are true, complete, and not misleading as regards to the representing and warranting party: (a) such Party has full authority to enter into this Agreement and to perform all of its obligations hereunder; (b) those executing this Agreement on behalf of each Party do so with the full authority of the Party each represents; (c) this Agreement constitutes a legal, valid, and binding obligation of each Party, enforceable in accordance with its terms.

6.2. Notices, Demands, and Communications between the Parties

Formal notices, demands, and communications between the Agency and Participant shall be sufficiently given if emailed and: (1) personally delivered; or (2) if dispatched by registered or certified mail, postage prepaid, return-receipt requested, to the principal offices of the Agency and Participant, as designated in Sections 1.8.1 and 1.8.2 hereof. Such written notices, demands, and communications may be sent in the same manner to such other addresses as either Party may from time to time designate by formal notice hereunder. Delivery of notice shall be complete upon mailing or making physical delivery of the writing to the following as outlined above:

IF TO PARTICIPANT:	T. Johnson Management LLC Attn: Travis Johnson 10771 South Rippling Bay South Jordan, Utah 84009 Email: lj@larrymylar.com
With a copy to:	Coulter Tateoka, P.C. Attn: Derek Coulter 11576 S. State St., Ste. 503 Draper, Utah 84020
IF TO AGENCY:	Redevelopment Agency of Herriman City Attn: Chairman or Executive Director 5355 West Herriman Main Street, Herriman, Utah 84096
With a copy to:	City Attorney 5355 West Herriman Main Street Herriman, Utah 84096

6.3. <u>Severability</u>

In the event that any condition, covenant or other provision herein contained is held to be invalid or void by a court of competent jurisdiction, the same shall be deemed severable from the remainder of this Agreement and shall in no way affect any other covenant or condition herein contained unless such severance shall have a material effect on the terms of this Agreement. If such condition, covenant, or other provision shall be deemed invalid due to its scope, all other provisions shall be deemed valid to the extent of the scope or breadth permitted by law.

6.4. <u>Nonliability of Officials and Employees</u>

No director, officer, agent, employee, representative, contractor, attorney, or consultant of the Parties hereto shall be personally liable to any other Party hereto, or any successor-in-interest thereof, in the event of any Default or breach by a Party hereto or for any amount which may become due to a Party hereto or to its successor, or on any obligations under the terms of this Agreement.

6.5. <u>Enforced Delay; Extension of Time and Performance</u>

In addition to the specific provisions of this Agreement, performance by either Party hereunder shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, lock-outs, riots, floods, earthquakes, fires, casualties, acts of God, acts of a public enemy, terrorist activity, epidemics, quarantine restrictions, freight embargoes, lack of transportation, unusually severe weather, or any other causes beyond the reasonable control or without the fault of the Party claiming an extension of time to perform. An extension of time for any such cause shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if notice by the Party claiming such extension is sent, whether on the part of the Agency's Executive Director or its governing board or on the part of Participant, to the other Party within thirty (30) days of actual knowledge of the commencement of the cause. Time of performance under this Agreement may also be extended in writing by the Agency and Participant by mutual agreement.

6.6. <u>Approvals</u>

Whenever the consent or approval is required of any Party hereunder, except as otherwise herein specifically provided, such consent or approval shall not be unreasonably withheld or delayed.

6.7. <u>Time of the Essence</u>

Time shall be of the essence in the performance of this Agreement.

6.8. <u>Attorney Fees</u>

In the event of any litigation arising from or related to this Agreement, the prevailing Party shall be entitled to recover from the non-prevailing party all reasonable costs and attorney fees related to such litigation.

6.9. <u>Interpretation</u>

The Parties hereto agree that they intend by this Agreement to create only the contractual relationship established herein, and that no provision hereof, or act of either Party hereunder, shall be construed as creating the relationship of principal and agent, or a partnership, or a joint venture, or an enterprise between the Parties hereto.

6.10. <u>No Third-Party Beneficiaries</u>

It is understood and agreed that this Agreement shall not create for either Party any independent duties, liabilities, agreements, or rights to or with any third party, nor does this Agreement contemplate or intend that any benefits hereunder accrue to any third party.

6.11. <u>Mediation</u>

In the event a dispute arises between the parties with respect to the terms of this Agreement or the performance of any contractual obligation by one or both of the parties, the parties agree to submit the matter to formal and confidential non-binding mediation before any judicial action may be initiated, unless an immediate court order is needed or a statute of limitations period will run before mediation can be reasonably completed, except in the event the parties agree to toll the statute of limitations specifically for the completion of mediation. A mediator will be selected by mutual agreement of the parties. The parties must mediate in good faith to resolve the dispute in a timely manner. Each party will be responsible for its own costs and one-half of the cost of the mediator. The place of mediation shall be Herriman, Utah.

6.12. Headings

Article and Section titles, headings or captions are inserted only as a matter of convenience and for reference and in no way define, limit, extend, or describe the scope of this Agreement or the intent of any provision hereof.

6.13. Contra Proferentem

This is an arm's-length Agreement: The Parties have read this Agreement and have executed it voluntarily after having been apprised of all relevant information and the risks involved and having had the opportunity to obtain legal counsel of their choice. Consequently, no provision of this Agreement shall be strictly construed against either Party.

6.14. Further Assurances

The Parties shall cooperate, take such additional actions, sign such additional documentation, and provide such additional information as reasonably necessary to accomplish the objectives set forth in this Agreement.

6.15. Incorporation of Recitals and Exhibits

All recitals and exhibits attached hereto are incorporated into this Agreement as if fully set forth herein.

6.16 Governmental Records And Management Act

The Agency acknowledges that Participant considers all of the information provided to the Agency in connection with this Agreement is protected under the Utah Governmental Records Access and Management Act, § 63-2-101 *et seq.* under a claim of "business confidentiality" so long as Participant complies with the applicable requirements in making a claim of business confidentiality under § 63G-2-309(1)(a)(i)(A) & (B).

7. DUPLICATION, INTEGRATION, WAIVERS, AND AMENDMENTS

7.1. Duplicate Originals

This Agreement may be executed in duplicate originals, each of which shall be deemed an original. Electronic pdf signatures shall be considered original signatures.

7.2. Integration

This Agreement (including its exhibits) constitutes the entire understanding and agreement of the Parties regarding the subject matter thereof. When executed by the Parties, this Agreement integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the Parties with respect to the subject matter thereof.

7.3. Waivers and Amendments

All waivers of the provisions of this Agreement must be in writing. This Agreement and any provisions hereof may be amended only by mutual written agreement between Participant and the Agency.

[signatures on following page]

COMMUNITY DEVELOPMENT AND RENEWAL AGENCY OF HERRIMAN CITY

____
LORIN PALMER, Chair

ATTEST

____
JACKIE NOSTROM, Secretary

____
Attorney for Agency
Approved as to form and legality

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

In the County of Salt Lake, State of Utah, on this _____ day of ________________________________, 2022, before me, the undersigned notary, personally appeared Lorin Palmer and Jackie Nostrom , the Chair and the Secretary, respectively, of the Community Development and Renewal Agency of Herriman City, who are personally known to me or who proved to me their identities through documentary evidence to be the persons who signed the preceding document in my presence and who swore or affirmed to me that their signatures are voluntary.

____
NOTARY

Signature ____

Name ____

Title ____

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

In the County of Salt Lake, State of Utah, on this _____ day of _________________________, 2022, before me, the undersigned notary, personally appeared ____, the _____________________________ of , a Utah limited liability company, who is personally known to me or who proved to me his/her identity through documentary evidence to be the person who signed the preceding document in my presence and who swore or affirmed to me that his/her signature is voluntary.

____
NOTARY

Exhibit A

to Participation Agreement

Sales Tax Interlocal Agreement

Exhibit B

to Participation Agreement

Site Plan

Exhibit C
to Participation Agreement

Public Infrastructure

PARTICIPATION AGREEMENT

Between

THE COMMUNITY DEVELOPMENT AND RENEWAL AGENCY OF HERRIMAN CITY

And

NATIONAL AUTOMALL OF HERRIMAN

TABLE OF CONTENTS

This Participation Agreement ("Agreement") is made and entered into this ____ day of ____________________, 2022 ("Effective Date"), between the Community Development and Renewal Agency of Herriman City ("Agency"), a political subdivision of the State of Utah, operating under the Utah Community Reinvestment Agency Act (the "Act"; § 17C-1-101 *et seq.*, or its predecessor statutes), and National Automall of Herriman, a Utah Corporation ("Participant"). Participant and the Agency may from time to time hereinafter be referred to individually as a "Party" and collectively as the "Parties."

1. SUBJECT OF AGREEMENT

1.1. Purpose of the Agreement

The purpose of this Agreement is to (a) implement the Herriman North Community-Community Reinvestment Project Area Plan (the "Project Area Plan") as adopted by the Agency, by providing for the development of an auto mall on approximately 68 acres of real proeprty, as more particularly described below, located in the City of Herriman, Utah, comprising the Herriman North Community-Community Reinvestment Project Area ("Project Area"), and (b) specify the terms and conditions pursuant to which the Agency and Participant will cooperate in bringing about this objective, including the funds the Agency will provide to assist in the development of the Project Area.

1.2. Agreement in the Best Interests of the City and Residents

This Agreement is in the vital and best interests of the City of Herriman, Utah ("City") and the health, safety and welfare of its residents, and in accord with public purposes. This Agreement is carried out pursuant to the Act.

1.3. The Project Area

The Project Area is located within the boundaries of the City and legally described in the Project Area Plan.

1.4. The Project Area Plan and Budget

This Agreement is subject to the provisions of the Project Area Plan, as approved and adopted on ____________, 2020, by the City Council of the City, in Ordinance No. 20-___, and the budget adopted by the Agency for the Project Area.

1.5. Interlocal Agreement

The Agency has entered into an Interlocal Agreement with the City, which has been amended and may be amended from time to time, to pay to the Agency certain sales tax amounts for purposes of funding part of the costs of development for the Project Area (the Interlocal Agreement along with any Amendments thereto are collectively the "Sales Tax Interlocal Agreement"). The Sales Tax Interlocal Agreement is attached to this Agreement as **Exhibit A**. As described in the Sales Tax Interlocal Agreement, sales occurring within the boundaries of the City are currently subject to a one (1) percent sales tax ("Local Sales Tax") per Title 59, Chapter 12, Part 2 of the Utah Code, the Local Sales and Use Tax Act, and more particularly per UTAH CODE § 59-12-204. Approximately fifty (50) percent of that one-percent tax as set forth in UTAH CODE § 59-12-205(2)(b) is based on the transaction occurring within the boundaries of the City. Pursuant to UTAH CODE § 17C-5-204 and UTAH CODE § 11-13-215, the City has agreed and consented that the Agency shall be paid a portion of the point-of-sale tax generated by sales attributable to the Site (defined below and described in the attached **Exhibit B**) (the fifty percent paid to the Agency is referred to herein as "Point-of-sale Tax" or "POST"). Pursuant to the Sales Tax Interlocal Agreement, the Agency is entitled to receive up to seventy percent (70%) of the POST for a period beginning on the date requested by Agency and ending fifteen (15) years after the date of the Agency request ("Sales Tax Rebate").

1.6. The Site and the Facility

Participant intends to develop an auto mall and other commercial retail within the Project Area ("Facility"). The Facility shall be located on approximately the portion of the Project Area shown on Exhibit B ("Site"). The Facility means the cost of public infrastructure as identified on **Exhibit C**, real property acquisition within the Project Area, and incentives to participants, developers, or auto dealers located in the Project Area.

1.7. The Incentive

As used in this Agreement, the term "Incentive" means one hundred percent (100%) of the Sales Tax Rebate *after* (i) satisfaction of the City's obligations pursuant to that certain Settlement Agreement of Condemnation Action dated February 11, 2019 by and among Roger H. Furse, Dennis E. Furse, Janna F. Anderson, Chad B. Buehler, Jillene Buehler, Dian Thomas, trustee of the 1996 Dian Thomas Trust, Carolee H. Hepner, Trustee of the William Beckstead Trust, and Butterfield Commercial, LLC and the City; and (ii) the Agency's allocation and set aside of ten percent (10%) of the Sales Tax Rebate for housing as required by UTAH CODE § 17C-5-307.

1.8. Parties to the Agreement

1.8.1. The Agency

The Agency is a public body, corporate and politic, exercising governmental functions and powers, and organized and existing under the Act. The address of the Agency is stated in Section 6.2 below.

1.8.2. The Participant

Participant isNational Automall of Herriman, a Utah Corporation. The address of Participant is stated in Section 6.2 below.

1.9. Prohibition against Certain Changes

1.9.1. Acknowledgement by Participant

Participant acknowledges the importance of the development of the Project Area to the general welfare of the community, the public assistance set forth in this Agreement that has been made available by law and by the Agency for the purpose of making the investment within the Project Area possible, that a significant change in the identity of Participant, as prohibited by this Section 1.9.1, may be considered, for practical purposes, a transfer or disposition of the Facility, the qualifications and identity of Participant are of particular concern to the Agency, and that it is because of such qualifications and identity that the Agency is entering into this Agreement with Participant.

1.9.2. Representation as to Investment Intent

Participant represents and agrees that its investment in and use of the Site and Participant's other undertakings reflected in this Agreement are and shall only be for the purpose of Participant's development of the Facility and not for speculation in land holding or otherwise.

1.9.3. Assignment or Transfer of Agreement

Participant represents and agrees for itself and its successors and assigns that, during the term of this Agreement and except as set forth in the following sentence, Participant will not assign or transfer or attempt to assign or transfer all or any part of this Agreement, or any rights herein or obligations hereunder, during the term of this Agreement except as agreed to in a writing signed by the Parties.

The foregoing notwithstanding, Participant may transfer its rights and obligations under this Agreement to any of its subsidiaries or affiliates without the Agency's prior written approval during the term of this Agreement so long as the Facility continues to operate as described in this Agreement.

The attempted or actual assignment or delegation of this Agreement in violation of the above provisions is a material Default that shall be subject to the provisions of Article 5 of this Agreement.

For purposes of this Section 1.9.3, the term "subsidiaries" shall mean those companies or entities in which Participant both holds an ownership stake of more than 50 percent and over which Participant is able to exert control and the term "affiliates" shall mean those companies in which the owner of Participant both holds an ownership stake of more than 50 percent and over which the owner of Participant is able to exert control. Additionally, and for purposes of this Section, "control" (and its correlative meanings, "controlled by" and "under common control with") shall mean possession, directly or indirectly, or power to direct or cause the direction of management or policies (whether through ownership of securities or partnership or other ownership interests, by contract or otherwise).

1.9.4. Transfer to Tax-Exempt Organization

Notwithstanding anything in this Agreement to the contrary, any attempt by Participant or its successor(s) in interest to transfer the Site or any of the personal property within the Site to a tax-exempt organization or otherwise to exempt any of the property within the Project Area from *ad valorem* property taxation without the prior written consent of the Agency will entitle the Agency, at its sole discretion, to immediately and without prior notice terminate this Agreement and cease further payments under this Agreement to Participant or its successors or assigns.

1.9.5. Continuing Obligations

Any permitted assignment or transfer of this Agreement, in whole or in part, shall relieve Participant from any and all obligations under this Agreement; provided, however, that the assignee has accepted the assignment and assumed all duties, obligations and liabilities of Participant under this Agreement in writing. Except as otherwise provided herein, all of the terms, covenants, and conditions of this Agreement are and will remain binding upon Participant and its successors and assigns until the expiration or termination of this Agreement.

2. <u>OBLIGATIONS OF THE PARTIES</u>

2.1. <u>Payment of Incentive</u>

2.1.1. Payment Obligation

So long as Participant fulfills all of its obligations under this Agreement, the Agency will pay to Participant the Incentive as described herein. The Agency expects to receive the monthly Sales Tax Rebate approximately one month and twenty days after the end of the calendar month for which the sales taxes were paid (e.g., the Agency expects to receive August payment of the Sales Tax Rebate by October 20). After the end of the calendar month for which the Agency is collecting the Sales Tax Rebate, the contemplated payment of the Incentive shall be made by the Agency within fifteen (15) days after the date on which all of the conditions precedent as set forth in Section 2.3 have been met.

2.1.2. Sales Tax Rebate Payments

The Agency is entitled to receive the Sales Tax Rebate beginning on the date first requested by the Agency. Such Sales Tax Rebate shall continue for a period of not greater than fifteen (15) years from the date which Participant first receives the Incentive as described herein or until such time as the Agency has paid to the Participant, its designated affiliate, or assignees as permitted herein, the total amount of $12,500,000.00 (the "Incentive Cap").

2.1.3. Distribution of Incentive to Participant

Participant shall be entitled to receive up to $5,000,000.00 of Incentive for a new or used vehicle dealership, as defined in Utah Code, that is constructed and operated on Participant's property located at the Site. Participant shall be entitled to receive up to an additional $3,000,000.00 of Incentive for a dealership that is operated on Participant's property located at the Site if one of the dealerships is for new vehicles, recreational vehicles, or boats.

2.1.4. <u>Distribution of Incentive to Assignees</u>

The Parties hereto acknowledge that H.B. 151 (2022) amended the Agency's ability to enter into agreements for retail facility incentives. Accordingly, the Parties intend to establish parameters under which a portion of the Incentive Cap contemplated herein may be assigned by the Participant when the Participant recruits additional retail users to the Site. If Participant brings any uses to the Site which are permitted or conditional under the City's current land use ordinances or a development agreement applicable to the Site (collectively the "Permitted Uses"), and the Permitted Uses are actually constructed and operational on the Site, then Participant may assign a portion of the incentive according to the conditions and parameters set forth in this Section.

For each Permitted Use that locates and operates within the Site, Participant may assign up to $1,500,000.00 of additional Incentive generated from each Permitted Use (the "Permitted Use Assignment"). Participant may only assign up to $4,500,000.00 of Permitted Use Assignments over the life of this Agreement. An assignment, however, is subject to the written consent of the Agency.

As part of the Permitted Use Assignment contemplated by this Section 2.1.4, and in consideration of Participant's recruitment of additional Permitted Uses to the Site, the Participant may holdback up to 25% of each Permitted Use Assignment.

2.2. Sole Source of Funding for the Incentive

The entirety of Incentive contemplated in this Agreement will be funded solely by the Sales Tax Rebate payments received by the Agency during the term of this Agreement and pursuant to the Sales Tax Interlocal Agreement. Participant is not, and shall not be, entitled to any other funds collected by the Agency for the Project Area, including other sales taxes, property taxes, or current or future interlocal agreements, or any other funds held by the Agency.

2.3. Conditions Precedent to the Payment of the Incentive to Participant

In addition to other provisions in this Agreement, the Agency has no obligation to remit to Participant the Incentive unless and until all the following conditions precedent, as detailed in the following subsections, are satisfied:

2.3.1. Agency is Entitled to Receive the Sales Tax Rebate

The Agency is not obligated to pay to Participant any of the Incentive unless the Agency is legally entitled to receive the Sales Tax Rebate pursuant to the Sales Tax Interlocal Agreement.

2.3.2. Agency has Actually Received the Sales Tax Rebate Payment

The Agency is obligated to pay to Participant the Incentive only to the extent the Agency has actually received the Sales Tax Rebate payment(s) for the particular calendar month. Participant agrees and acknowledges that the calculation of payments of the Sales Tax Rebate pursuant to the Sales Tax Interlocal Agreement may require information about taxable sales occurring at the Facility from Participant, its assignees as permitted herein, or from the Utah State Tax Commission. Participant agrees to take such actions as reasonably necessary to provide the Agency with information reasonably necessary to allow the City and the Agency to calculate the amount of the Sales Tax Rebate pursuant to this Agreement and in compliance with the Sales Tax Interlocal Agreement.

2.3.3. Continued Operation of the Facility

The Agency is not obligated to pay to Participant or its permitted assignees the Incentive until the Participant and/or its assignees has continuously operated (defined in Section 2.10) the Facility for the entire month for which payment of the Incentive is being sought.

2.4. Effect of Failure to Meet Conditions Precedent to Payment of Incentive

In the event that the conditions precedent as described in Section 2.3 are not met for any given calendar month during the term of this Agreement, and Participant is thus not entitled to receive the Incentive attributable to that calendar month, but is otherwise not in default under this Agreement, such failure shall not constitute a Default under this Agreement. Such failure shall result in the forfeiture by Participant of the Incentive for that particular calendar month.

2.5. Limitations on Incentive

The Incentive term shall begin either on (1) the issuance of the first certificate of occupancy for an auto dealership within the Facility, or (2) the date requested by Agency, and shall end fifteen (15) years thereafter (the "Incentive Term").

Participant further acknowledges that the Incentive paid by the Agency to Participant under this Agreement is limited by the Incentive Term and the amount of Sales Tax Rebate actually received by the Agency. Participant further acknowledges that the Agency does not guarantee that Participant will receive a minimum dollar amount during the Incentive Term. The amount of Sales Tax Rebate generated by the Facility is determined by taxable sales occurring at the Facility.

Notwithstanding all other provisions in this Agreement, the Agency is not obligated to pay to Participant in any one calendar month more than the Incentive attributable to such calendar month.

The Agency shall not support any modification or amendment to the Sales Tax Interlocal Agreement that would reduce, on a percentage basis, the amount of Incentive that Participant is entitled to receive under this Agreement or the term during which Participant is entitled to receive the Incentive.

2.6. Payment of Taxes

During the term of this Agreement, to the extent applicable, Participant and any of its successors-in-interest in any portion of the Site or Facility agree to pay, prior to delinquency, all undisputed real property and other *ad valorem* taxes and assessments assessed against any portion of the Site or Facility or any other taxable property, including personal property, located within the Facility to the extent owned by Participant or any of its successors-in-interest; provided, however, that Participant expressly retains any and all rights to: (a) challenge, object to, or appeal any real property or personal property and other *ad valorem* taxes and assessments; and (b) petition for the reduction thereof.

2.7. Reduction or Elimination of Incentive

The Parties agree that Participant assumes and accepts the risk of possible alteration of Federal or State statute, regulation, or adjudication rendering unlawful or impractical the collection, receipt, disbursement, or application of the Incentive to the Agency as contemplated in and by this Agreement. If the provisions of Utah law which govern the payment of the Incentive to the Agency are changed or amended so as to reduce or eliminate the amount paid to the Agency under the Sales Tax Interlocal Agreement, the Agency's obligation to pay Participant annually the Incentive, as applicable, will be proportionately reduced or eliminated, but only to the extent necessary to comply with the changes in such law. Participant agrees and acknowledges that it has made such investigations as necessary and assumes all risk as to whether the Project Area, the Plan, the Budget, the Sales Tax Interlocal Agreement, and this Agreement were properly approved, adopted, executed, and made effective. Notwithstanding any change in law, Participant specifically reserves and does not waive any right it may have to challenge, at Participant's cost and expense, the constitutionality of any law change(s) that would reduce or eliminate the payment of Incentive to the Agency and/or Participant and nothing herein shall be construed as an estoppel, waiver or consent to reduce or eliminate payment of the Incentive to the Agency and/or Participant. Participant acknowledges, understands, and agrees that the Agency is under no obligation to challenge the validity, enforceability, or constitutionality of a change in law that reduces or eliminates the payment of Incentive to the Agency and/or Participant, or to otherwise indemnify or reimburse Participant for its actions to independently do so.

2.8. Declaration of Invalidity

In the event any legal action is filed in a court of competent jurisdiction that seeks to invalidate the Project Area or this Agreement or that otherwise seeks to or would have the possible result of reducing or eliminating the payment of the Incentive to the Agency, the Agency shall provide written notice of such legal action to Participant. In the event such an action is filed, the Agency shall have no obligation to challenge that action or defend itself against such action. Participant specifically reserves and does not waive any right it may have to intervene, at Participant's cost and expense, in any such legal action and challenge the basis for any causes of action or any remedy sought that would reduce or eliminate the payment of the Incentive to the Agency and/or Participant, and nothing herein shall be construed as an estoppel, waiver or consent to reduce or eliminate payment of the Incentive to the Agency and/or Participant. In the event that the court declares that the Agency cannot receive the Incentive, invalidates the Project Area or this Agreement, or takes any other action which eliminates or reduces the amount of Incentive paid to the Agency, and the grounds for the legal determination cannot reasonably be addressed by the Agency, the Agency's obligation to annually pay to Participant the Incentive in accordance with this Agreement will be reduced or eliminated to the extent that the Incentive is not received by the Agency.

2.9. Dispute over Receipt of Payment of the Incentive

In the event a dispute arises as to the person or entity entitled to receive the Incentive under this Agreement due to a claimed assignment or claimed successor-in-interest to the Incentive or otherwise, the Agency may withhold payment of the Incentive and may refrain from taking any other action required of it by this Agreement until the dispute is resolved either by agreement or by a court of competent jurisdiction and sufficient evidence of such resolution is provided to the Agency. The Agency shall be entitled to deduct from its payment of the Incentive any costs or expenses, including reasonable attorney fees, incurred by the Agency due to the dispute, except in the instance that the dispute arises due to the act, error or omission of the Agency, in which case the Agency shall be responsible for all costs and expenses including reasonable and actual attorney fees.

2.10. Nature of Participant's Obligations and Limitation

To qualify to receive the Incentive as set forth herein, Participant shall fulfill all of its obligations as set forth in this Agreement. The failure of Participant to fulfill its obligations may result in a failure to qualify to receive the Incentive or termination of this Agreement but shall not give rise to any other right or remedy in favor of the Agency.

2.11. Development of the Facility

Participant shall develop the Facility in a commercially reasonable manner substantially similar to other auto malls.

2.12. Commencement of Development

Development of the Facility as described in Section 2.12 shall begin as soon as reasonably possible. If Participant fails to develop the Facility as required by this Section for any reason other than events of force majeure, the Agency shall have the right to terminate this Agreement upon written notice to Participant, subject, however, to any notice and cure periods set forth in Article 5.

The Parties understand and agree that funding for the Facility comes entirely from Participant's internal capital or from financing obtained by Participant. The Agency shall not be liable or responsible for providing, obtaining, or guaranteeing such financing.

2.13. Potential Shortfall

Participant agrees and acknowledges that the only funds available to the Agency for compensation or incentives to Participant are those funds received by the Agency under the Sales Tax Interlocal Agreement and that the amount of Incentive paid to Participant under this Agreement is dependent on the taxable sales occurring within the Site.

2.14. Audits, Appeals, and Reassessments

In the event that the Utah State Tax Commission or other court or governmental entity with jurisdiction (a "Tax Authority") finds that Participant owes additional sales taxes for taxable sales occurring at the Facility, the Agency shall have no obligation to pay the Incentive for such additional amounts. In the event that a Tax Authority finds that Participant overreported or overpaid sales taxes for sales occurring at the Facility, Participant shall immediately pay to the Agency the portion of the Incentive attributable to such overage.

3. ADDITIONAL TERMS

3.1. Investment

Participant will at all times be responsible for its investment at the Facility. Recognizing the level of investment by Participant, the Agency has determined that it is in the best interests of the residents of the City to provide the Incentive to Participant to develop and operate the Facility as contemplated in this Agreement.

3.2. Responsibility for Development Plans and Permits

The Agency shall not have any responsibility to obtain permits, licenses, or other approvals for Participant's development or operation of the Facility.

3.3. Other Terms

3.3.1. City Land Use Authority

Participant acknowledges that nothing in this Agreement shall be deemed to supersede, waive, or replace the City's authority over land use, zoning, and permitting within the City.

3.3.2. Restriction Against Parcel Splitting

If applicable, during the term of this Agreement, Participant shall not, without the prior written approval of the Agency, (a) convey its interest in the Site or any portion thereof, if any, in such a way that a parcel of real property would extend outside the Project Area, or (b) construct or install any building or structure within the Project Area in such a way that any portion of the Facility or structure would extend outside of the Project Area. Participant understands and acknowledges that these requirements are intended to avoid the splitting of any parcels of real property within the Project Area and to avoid the joining of any parcels of real property inside of the Project Area with parcel(s) outside of the Project Area in such a way that Salt Lake County could no longer identify the periphery of the Project Area by distinct parcels.

3.3.3. Deannexation

Participant agrees that it will not cooperate with any person, group, or municipality in any effort to remove, deannex, disconnect, or disincorporate the Site or any portion thereof from the City during the Incentive Term. In the event that the Site or a portion thereof is disconnected, deannexed, disincorporated, or otherwise removed from the municipal boundaries of the City, the Agency's obligations to pay the Incentive for that portion of the Site outside of the City shall immediately cease.

3.3.4. Indemnification

Participant agrees to and shall indemnify, defend, and hold the Agency and its directors, officers, agents, employees, and representatives harmless from and against all liability, loss, damage, costs, or expenses (including reasonable attorney fees and court costs) arising from or as a result of the death of any person, or any accident, injury, loss, or damage whatsoever caused to any third party person or to the property of any third party person, directly or indirectly caused by any acts done or any errors or omissions of Participant or its directors, officers, agents, employees, consultants, and contractors on the Facility or the Site except for willful misconduct or negligent acts or omissions of the Agency, the City, or their respective directors, officers, agents, employees, contractors, and consultants. Likewise, the Agency agrees to and shall indemnify, defend, and hold Participant and its directors, officers, agents, employees, and representatives harmless from and against all liability, loss, damage, costs, or expenses (including reasonable attorneys' fees and court costs) arising from or as a result of the death of any person, or any accident, injury, loss, or damage whatsoever caused to any third party person or to the property of any third party person, directly or indirectly caused by any acts done or any errors or omissions of the Agency, the City, or their respective directors, officers, agents, employees, contractors and consultants except for willful misconduct or negligent acts or omissions of Participant or its directors, officers, agents, employees, consultants, and contractors.

3.3.5. Limits on Liability

In no event shall one Party be liable to the other(s) for consequential, special, incidental, indirect, exemplary, or punitive damages of any kind (including, but not limited to, loss of profits, loss of reputation, or loss of current or prospective business advantage, even where such losses are characterized as direct damages) arising out of or in any way related to the relationship or dealings between Participant and the Agency, regardless of whether the claim under which damages are sought is based upon contract, tort, negligence (of any kind), willful misconduct, strict liability or otherwise, and regardless of whether the parties have been advised of the possibility of such damages at the time of contracting or otherwise.

3.3.6. Local, State, and Federal Laws

Participant shall develop and operate the Facility in conformity with all applicable laws; provided, however, that unless otherwise addressed elsewhere in this Agreement, nothing herein shall limit the right of Participant to properly challenge any such law or the applicability of such law.

3.3.7. Rights of Access

Representatives of the Agency shall have the right of reasonable access to the Facility for purposes of inspection, with reasonable and prior written notice (but in no event less than 48 hours prior), and without charges or fees, during normal business hours or as otherwise agreed to in writing by Participant, subject, however, to the rules, regulations, security protocols and other access limitations for safety and security purposes as required by Participant or by the owner or operator of the Facility. The Agency agrees to and shall indemnify and hold Participant harmless from and against all liability, loss, damage, costs, or expenses arising from or as a result of the death of any person or any accident, injury, loss or damage whatsoever caused to any person or the property of any person which shall occur as a result of or arising from the Agency's or the City's, or their respective directors, officers, agents, employees, contractors and consultants, entry upon or activities on the Site or in the Facility, except that this indemnity shall not apply to the sole negligence or willful misconduct of Participant.

3.3.8. Responsibility of the Agency

The Agency shall not have any obligation under this Agreement other than those specifically provided for herein. Except as expressly provided for in this Agreement, nothing herein shall be construed as requiring the Agency to pre-approve or prejudge any matter, or as otherwise binding the Agency's discretion or judgment on any issue prior to an appropriate hearing (if required), review, or compliance with any other requirement.

3.3.9. Non-waiver of Governmental Immunity

Nothing in this Agreement shall be construed as a waiver of any immunity, protection, or rights granted to the Agency under the Governmental Immunity Act of Utah, Utah Code 63G-7-101, *et seq*.

4. EFFECT AND DURATION OF COVENANTS; TERM OF AGREEMENT

The covenants, including but not limited to conformance with federal, local, and state laws, established in this Agreement shall, without regard to technical classification and designation, be binding on the Parties and any successors-in-interest for the benefit of each of the respective Parties, their successors and assigns during the term of this Agreement, which shall terminate upon the later of: (a) the final payment of the Incentive during or upon the expiration of the Incentive Term as set forth in Article 2 of this Agreement; or (b) upon the written agreement signed by the Parties hereto.

5. DEFAULTS, REMEDIES, AND TERMINATION

5.1. Default

If either the Agency or Participant fails to perform or delays performance of any material obligation of this Agreement and fails to cure as provided for in this Article 5, such conduct constitutes a default of this Agreement ("Default"). The Party in default must immediately commence to cure, correct, or remedy such failure or delay and shall complete such cure, correction, or remedy within the periods provided in Section 5.3 hereof.

5.2. Notice

If a Default under this Agreement occurs, the non-defaulting Party shall give written notice pursuant to Section 6.2 below (a "Default Notice") of the Default to the defaulting Party, specifying the nature of the Default. Failure or delay in giving such notice shall not constitute a waiver of any Default, nor shall it change the time of Default, nor shall it operate as a waiver of any rights or remedies of the non-defaulting Party; but the non-defaulting Party shall have no right to exercise any remedy hereunder without delivering the Default Notice as provided herein. Delays by either Party in asserting any of its rights and remedies shall not deprive the other Party of its right to institute and maintain any actions or proceedings which it may deem necessary to protect, assert, or enforce any such rights or remedies.

5.3. Cure Period

The non-defaulting Party shall have no right to exercise a right or remedy hereunder unless the subject Default continues uncured for a period of thirty (30) days after delivery of the Default Notice with respect thereto, or, where the default is of a nature which cannot be cured within such thirty (30) day period, the defaulting Party fails to commence such cure within thirty (30) days and to diligently proceed to complete the same. A Default which can be cured by the payment of money is understood and agreed to be among the types of defaults which can be cured within thirty (30) days. If the Default is not cured, or commenced to be cured if such default is of a nature which cannot be cured within thirty (30) days, by such Party within thirty (30) days of delivery of the Default Notice, such failure to cure shall be an Event of Default, and the non-defaulting Party may pursue such other rights and remedies as it may have, except, however, if Participant fails to commence or continue Operations as required by Sections 2.10 and 2.11, above, then in such case Agency's sole remedy shall be to terminate this Agreement (for clarity, Agency may not commence an action against Participant for specific performance to commence or continue Operations). Further, in the event of a Default by Participant, past all applicable cure periods, Agency's sole remedy shall be to terminate this Agreement.

5.3.1. Rights and Remedies

Upon the occurrence of a Default (following the expiration of the applicable cure period provided herein or by law, whichever is longer), the non-defaulting Party shall have all remedies provided for in this Agreement and shall have the right to obtain specific performance, unless otherwise limited by the express remedies set forth in this Agreement. Such remedies are cumulative, and the exercise of one or more of such rights or remedies shall not preclude the exercise, at the same or different times, of any other rights or remedies for the same Default or any other Default by the defaulting Party.

5.3.2. Legal Actions

5.3.2.1. Venue

All legal actions between the Parties, arising under this Agreement, shall be conducted exclusively in the Third District Court for the State of Utah located in Salt Lake County, Utah, unless they involve a case with federal jurisdiction, in which case they shall be conducted exclusively in the Federal District Court for the District of Utah.

5.3.2.2. Service of Process

Service of process on the Agency shall be made by personal service upon the Chairman or Executive Director of the Agency or in such other manner as may be provided by law. Service of process on Participant shall be by personal service upon its Registered Agents, or in such other manner as may be provided by law, whether made within or without the State of Utah.

5.3.2.3. Applicable Law

The laws of the State of Utah shall govern the interpretation and enforcement of this Agreement.

6. GENERAL PROVISIONS

6.1. Authority

Each Party hereby represents and warrants to the other that the following statements are true, complete, and not misleading as regards to the representing and warranting party: (a) such Party has full authority to enter into this Agreement and to perform all of its obligations hereunder; (b) those executing this Agreement on behalf of each Party do so with the full authority of the Party each represents; (c) this Agreement constitutes a legal, valid, and binding obligation of each Party, enforceable in accordance with its terms.

6.2. Notices, Demands, and Communications between the Parties

Formal notices, demands, and communications between the Agency and Participant shall be sufficiently given if emailed and: (1) personally delivered; or (2) if dispatched by registered or certified mail, postage prepaid, return-receipt requested, to the principal offices of the Agency and Participant, as designated in Sections 1.8.1 and 1.8.2 hereof. Such written notices, demands, and communications may be sent in the same manner to such other addresses as either Party may from time to time designate by formal notice hereunder. Delivery of notice shall be complete upon mailing or making physical delivery of the writing to the following as outlined above:

IF TO PARTICIPANT:

IF TO AGENCY: Redevelopment Agency of Herriman City
Attn: Chairman or Executive Director
5355 West Herriman Main Street,
Herriman, Utah 84096

With a copy to: City Attorney
5355 West Herriman Main Street
Herriman, Utah 84096

6.3. Severability

In the event that any condition, covenant or other provision herein contained is held to be invalid or void by a court of competent jurisdiction, the same shall be deemed severable from the remainder of this Agreement and shall in no way affect any other covenant or condition herein contained unless such severance shall have a material effect on the terms of this Agreement. If such condition, covenant, or other provision shall be deemed invalid due to its scope, all other provisions shall be deemed valid to the extent of the scope or breadth permitted by law.

6.4. Nonliability of Officials and Employees

No director, officer, agent, employee, representative, contractor, attorney, or consultant of the Parties hereto shall be personally liable to any other Party hereto, or any successor-in-interest thereof, in the event of any Default or breach by a Party hereto or for any amount which may become due to a Party hereto or to its successor, or on any obligations under the terms of this Agreement.

6.5. Enforced Delay; Extension of Time and Performance

In addition to the specific provisions of this Agreement, performance by either Party hereunder shall not be deemed to be in default where delays or defaults are due to war, insurrection, strikes, lock-outs, riots, floods, earthquakes, fires, casualties, acts of God, acts of a public enemy, terrorist activity, epidemics, quarantine restrictions, freight embargoes, lack of transportation, unusually severe weather, or any other causes beyond the reasonable control or without the fault of the Party claiming an extension of time to perform. An extension of time for any such cause shall be for the period of the enforced delay and shall commence to run from the time of the commencement of the cause, if notice by the Party claiming such extension is sent, whether on the part of the Agency's Executive Director or its governing board or on the part of Participant, to the other Party within thirty (30) days of actual knowledge of the commencement of the cause. Time of performance under this Agreement may also be extended in writing by the Agency and Participant by mutual agreement.

6.6. Approvals

Whenever the consent or approval is required of any Party hereunder, except as otherwise herein specifically provided, such consent or approval shall not be unreasonably withheld or delayed.

6.7. Time of the Essence

Time shall be of the essence in the performance of this Agreement.

6.8. Attorney Fees

In the event of any litigation arising from or related to this Agreement, the prevailing Party shall be entitled to recover from the non-prevailing party all reasonable costs and attorney fees related to such litigation.

6.9. Interpretation

The Parties hereto agree that they intend by this Agreement to create only the contractual relationship established herein, and that no provision hereof, or act of either Party hereunder, shall be construed as creating the relationship of principal and agent, or a partnership, or a joint venture, or an enterprise between the Parties hereto.

6.10. No Third-Party Beneficiaries

It is understood and agreed that this Agreement shall not create for either Party any independent duties, liabilities, agreements, or rights to or with any third party, nor does this Agreement contemplate or intend that any benefits hereunder accrue to any third party.

6.11. Mediation

In the event a dispute arises between the parties with respect to the terms of this Agreement or the performance of any contractual obligation by one or both of the parties, the parties agree to submit the matter to formal and confidential non-binding mediation before any judicial action may be initiated, unless an immediate court order is needed or a statute of limitations period will run before mediation can be reasonably completed. A mediator will be selected by mutual agreement of the parties. The parties must mediate in good faith to resolve the dispute in a timely manner. Each party will be responsible for its own costs and one-half of the cost of the mediator. The place of mediation shall be Herriman, Utah.

6.12. Headings

Article and Section titles, headings or captions are inserted only as a matter of convenience and for reference and in no way define, limit, extend, or describe the scope of this Agreement or the intent of any provision hereof.

6.13. Contra Proferentem

This is an arm's-length Agreement: The Parties have read this Agreement and have executed it voluntarily after having been apprised of all relevant information and the risks involved and having had the opportunity to obtain legal counsel of their choice. Consequently, no provision of this Agreement shall be strictly construed against either Party.

6.14. Further Assurances

The Parties shall cooperate, take such additional actions, sign such additional documentation, and provide such additional information as reasonably necessary to accomplish the objectives set forth in this Agreement.

6.15. Incorporation of Recitals and Exhibits

All recitals and exhibits attached hereto are incorporated into this Agreement as if fully set forth herein.

6.16 Governmental Records And Management Act

The Agency acknowledges that Participant considers all of the information provided to the Agency in connection with this Agreement is protected under the Utah Governmental Records Access and Management Act, § 63-2-101 *et seq.* under a claim of "business confidentiality" so long as Participant complies with the applicable requirements in making a claim of business confidentiality under § 63G-2-309(1)(a)(i)(A) & (B).

7. DUPLICATION, INTEGRATION, WAIVERS, AND AMENDMENTS

7.1. Duplicate Originals

This Agreement may be executed in duplicate originals, each of which shall be deemed an original. Electronic pdf signatures shall be considered original signatures.

7.2. Integration

This Agreement (including its exhibits) constitutes the entire understanding and agreement of the Parties regarding the subject matter thereof. When executed by the Parties, this Agreement integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the Parties with respect to the subject matter thereof.

7.3. Waivers and Amendments

All waivers of the provisions of this Agreement must be in writing. This Agreement and any provisions hereof may be amended only by mutual written agreement between Participant and the Agency.

[signatures on following page]

COMMUNITY DEVELOPMENT AND RENEWAL AGENCY OF HERRIMAN CITY

____
LORIN PALMER, Chair

ATTEST

____
JACKIE NOSTROM, Secretary

____
Attorney for Agency
Approved as to form and legality

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

In the County of Salt Lake, State of Utah, on this _____ day of ______________________________, 2020, before me, the undersigned notary, personally appeared Lorin Palmer and Jackie Nostrom , the Chair and the Secretary, respectively, of the Community Development and Renewal Agency of Herriman City, who are personally known to me or who proved to me their identities through documentary evidence to be the persons who signed the preceding document in my presence and who swore or affirmed to me that their signatures are voluntary.

____
NOTARY

Signature ____

Name ____

Title ____

STATE OF UTAH)
: ss.
COUNTY OF SALT LAKE)

In the County of Salt Lake, State of Utah, on this _____ day of _________________________, 2020, before me, the undersigned notary, personally appeared ____, the _____________________________ of , a Utah limited liability company, who is personally known to me or who proved to me his/her identity through documentary evidence to be the person who signed the preceding document in my presence and who swore or affirmed to me that his/her signature is voluntary.

____
NOTARY

Exhibit A

to Participation Agreement

Sales Tax Interlocal Agreement

Exhibit B

to Participation Agreement

Site Plan

Exhibit C
to Participation Agreement

Public Infrastructure