

EXHIBIT A TO RESOLUTION 2023-063

**AFFORDABLE HOUSING DEVELOPMENT FUNDING ASSISTANCE AGREEMENT
BETWEEN THE CITY OF COMMERCE CITY AND 72 COLORADO, LLC**

THIS AFFORDABLE HOUSING DEVELOPMENT FUNDING ASSISTANCE AGREEMENT (“**AGREEMENT**”) is made and entered into by and between the CITY OF COMMERCE CITY, a Colorado home rule municipality (“**CITY**”), and 72 Colorado LLC, a Colorado limited liability company (“**Business**”), collectively, “**Parties**”, as of the date of attestation by the City’s Clerk (“**Effective Date**”).

WHEREAS, the Business wishes to construct in the City an affordable residential housing development at 72nd Avenue and Colorado Boulevard in Commerce City to be known as South Platte Crossing, consisting of 60 affordable housing units (“**Development**”);

WHEREAS, the Development will service the City Council’s goals, create much needed affordable housing in the City, create employment opportunities in the City, and support the further development of needed commercial and other development in the City;

WHEREAS, the Project has received the competitive 9% Low-Income Housing Tax Credits (“**LIHTC**”) through the Colorado Housing and Finance Authority, a CHFA permanent loan grant, Colorado Department of Housing funding, and a deferred developer fee;

WHEREAS, a drastic reduction in tax credit pricing, rising interest rates, higher material costs, and higher debt service costs have jeopardized the Development and resulted in an unanticipated financing gap estimated to be \$750,000;

WHEREAS, pursuant to Council direction provided on November 22, 2021, the City Council has approved assistance to the Business in the form of a rebate of certain fees and taxes, as such assistance will serve a public purpose and public need and be in the public interest, and authorized the City Manager to negotiate the terms of an Agreement for the assistance;

NOW, THEREFORE, in consideration of the mutual promises and conditions contained in this Agreement, the Parties agree as follows:

I. ASSISTANCE & CONDITIONS

- A. **Assistance & Conditions:** As assistance for the Development, the City will rebate, subject to annual appropriation by the City Council in its sole discretion, to the Business all of the following amounts (“**Assistance**”) derived from sales and use taxes and building permit fees and building plan review fees paid to the City by the Business or its vendors or contractors in connection with the Development between May 31, 2023 and completion of the Development, as evidenced by issuance of the certificate of occupancy and offering units for occupancy, but no later than October 31, 2024:
1. One hundred percent (100%) of building permit fees and building plan review fees payable and remitted to the City in connection with the Development;
 2. After accumulation of sales tax revenues pledged to the City’s outstanding sales and use tax revenue bonds in accordance with the ordinances authorizing such bonds, one hundred percent (100%) of the City’s non-dedicated sales and use taxes (at the 3.5% rate) payable and remitted to the City in connection with the Development; and
 3. Provided that such rebates shall not exceed an aggregate of \$750,000 for all fees and taxes.

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Any obligation of the City to rebate sales and use tax revenue shall be subordinate to obligations of the City under ordinances authorizing the City's sales and use tax revenue bonds. Any obligations of the City to rebate sales tax, use tax and building permit fees shall be subject to annual appropriation. Notwithstanding the foregoing, nothing in this Agreement shall limit the Business' rights pursuant to C.R.S. §§ 29-4-226 and 29-4-227.

- B. Payment: The City will provide accrued and payable Assistance following completion of the Development, as evidenced by the issuance of the certificate of occupancy, subject to any conditions of this Agreement. The City will issue payment to the Business within sixty (60) days following the Business' submission of its written request for payment and all of the Business' supporting documentation for such payment request in the amount of Assistance that the City determines is properly payable pursuant to such request and supporting documentation. If the City determines that the City has paid any amounts not properly payable to the Business, the City shall provide notice thereof to the Business, and the Business will have thirty (30) days to cure any defect in its documentation, and only thereafter shall the Business reimburse the City for any overpayment within sixty (60) days of written notice by the City. Except for conditions requiring the Business to reimburse the City, the satisfaction of all conditions in this Agreement shall be required before the City is obligated to pay any amounts.
- C. Conditions: These conditions are in addition to conditions provided elsewhere in this Agreement:
1. Substantial Progress Deadline. The Development must close on and provide evidence of a construction loan by October 31, 2023.
 2. Unit Delivery Requirement. As supported by the Approved Development Plan (**Exhibit A**) Development must be comprised of 60 units, ranging in size from studio units to three-bedroom apartments.
 3. Construction and Leasing Deadline. As supported by the construction schedule (**Exhibit B**), Development must be completed by January 31, 2025, as evidenced by the issuance of a certificate of occupancy for the entire Development, and a lease up rate of 95% achieved by August 31, 2025.
 4. Continuation of Affordable Housing. The Business will maintain the Development as affordable rental housing (defined as leasing one hundred percent (100%) of units for occupancy by individuals or families whose income is eighty percent (80%) or less of area median income) for at least thirty (30) years after construction is complete. The Development shall be maintained in accordance with Internal Revenue Code Section 42 income averaging rules, which allows LIHTC-qualified units to serve households earning as much as 80% of the area median gross income (AMGI), provided that the overall average income limit at the property does not exceed 60% of the AMGI.
 5. Property Maintenance and Upkeep. The Business and associated Development shall maintain basic equipment and facilities, lighting, ventilation, heating, insect and rodent control, sanitation and utilities to certain minimum standards so that they function properly and safely as part of a property management plan. The Business and associated Development shall provide the City with a copy of the property

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management plan. The City will have 30 days to review and provide reasonable comments on the management plan.. The Business will work in good faith with the City to address such comments, which will be subject to approval by the Business' lender(s) and investor(s) and subject to all laws and regulations applicable to the Development, and provided that the Business may, but shall not be obligated to, agree to comments which require the Business to undertake obligations which exceed the requirements of applicable law. The City expects the Business to implement and follow the property management plan in accordance with applicable federal and state law, including Colorado's implied Warranty of Habitability Law in regard to habitable and situations that interfere with a renter's life, health or safety, and were not caused by the renter.

6. Property Inspections: For the purposes of determining compliance with the provisions of minimum standards within the property management plan only, the Business and associated Development or authorized representative shall permit the Community Development Director or designee (the "City Inspector") entry to examine, inspect and survey all dwellings to be conducted quarterly by the City, at all reasonable times. The City Inspector shall provide seven (7) calendar days' written notice to the Business prior to all inspections, which shall be conducted between the hours of 9 a.m. and 4 p.m. Monday through Friday. The City Inspector at all times shall be accompanied by the Business' property management personnel. The Business will maintain the Development in sound, clean and weathertight condition and in conformity with local and state housing and health codes. Notwithstanding anything to the contrary contained herein, any inspection by the City Inspector is solely to determine compliance with the property management plan, which shall not be construed as a determination by the City Inspector that the dwellings are being maintained in compliance with any state or federal laws, including any fair housing laws.
7. Support for Assistance. The Business must submit documentation for any Assistance no later than January 30 of the year following any period for which payment of Assistance is claimed, or within thirty (30) days of such earlier date on which each of the conditions under this Section C have been satisfied, identifying all sales and use taxes, building permit fees, and building plan review fees for which the Assistance has been claimed and the accrued Assistance within the period covered by the documentation. The Business will provide data and documentation to the City upon request by the City and will cooperate with any City review to confirm any request for payment. The Business waives any claim to Assistance from the period covered by the documentation but not identified at that time.
8. Debts to the City. The City will not be obligated to pay any Assistance to the Business in the event that the Business is delinquent in any obligations and debts it owes the City, and all cure periods have expired, whether monetary or otherwise, including but not limited to any delinquent fees, fines, taxes, assessments, penalties, judgments, liens, and dedications, whether or not related to the Development.

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9. Payment of Fees and taxes. All fees and taxes payable with respect to the Development shall be timely paid to the City, including fees and taxes payable to any change orders executed for the construction of the Development, if any.
 10. Deficiency Reporting. The Business must report any claimed deficiencies or errors in any Assistance provided under this Agreement or data provided by the City within thirty (30) days of provision of such Assistance or data. Failure to report any such deficiencies or errors will relieve the City of any such obligation to pay Assistance related to such claimed deficiencies or errors.
 11. Payment of Fees & Taxes. All fees and taxes payable with respect to the Development shall be timely paid to the City, including fees and taxes payable for any change orders executed for the construction of the Development, if any.
 12. Deficiency Reporting. The Business must report any claimed deficiencies or errors in any Assistance provided under this Agreement or data provided by the City within thirty (30) days of the provision of such Assistance or data. Failure to report any such deficiencies or errors will relieve the City of any obligation to pay Assistance related to such claimed deficiencies or errors;
 13. Adequate Fees and Taxes. Because Assistance is provided from building permit fees, building plan review fees, and sales and use taxes (at the 3.5% rate) paid in connection with the Development, the City will not be obligated to provide Assistance if, at any time, the Assistance exceeds such fees and taxes actually paid by the Business to the City and the City will not be obligated to provide any additional Assistance until such paid fees and taxes are equal to or exceed the Assistance payable to the Business.
- D. Limitation of Assistance. Assistance is limited to building permit fees, building plan review fees, and sales and use tax (at the 3.5% rate) paid in connection with the Development. No other fees or amounts, including impact or development fees, will be subject to Assistance. The City's obligation to pay any Assistance is subject to all commitments to pay any City bonds and any restrictions in such bonds and any such payment obligations are subject to annual appropriation by the Council.
- E. Extension of Deadlines. All dates outlined in the Terms of Reimbursement are eligible for a potential, one time extension of six (6) months. A written notice of request to extend must be submitted to the City Manager at least thirty (30) days prior to the original deadline, and the notice must include an explanation for the request. The City Manager will have sole discretion to approve or decline requests.
- F. Interest. No interest shall accrue on any Assistance during any period of non-payment during any dispute as the City's obligation to provide any Assistance.
- G. Sales and Use Tax Restriction. Because a portion of the City's tax rate of 4.5% is dedicated to the construction of identified parks, recreation amenities, and roads, no portion of the 1.0% sales and use tax approved by voters on November 5, 2013, or any future increase in the City's sales and/or use tax will be used to provide any Assistance. All sales and use taxes must be remitted to the City at the current rate, as amended. Assistance related to sales and use taxes will be calculated based on a tax

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rate of 3.5%. Further, Assistance derived from sales and use taxes will be provided only from the sales and use taxes remitted to the City pursuant to the City's 3.5% tax rate and shall at all times be subordinate to the City's obligations to pay principal and interest on its sales and use tax bonds heretofore or hereafter issued.

- H. TABOR; Agreement Subject to Appropriations. The Parties acknowledge that the City is prohibited from incurring any multiple fiscal year debt or financial obligations to pay the Assistance or reimburse taxes to any person or entity without prior City-wide voter approval. Therefore, to avoid obtaining City-wider voter approval, the City's obligations to provide any Assistance are subject to annual appropriations that are a legislative decision of the City Council for the City. The City by this Agreement, does not bind future legislatures to make such appropriations. All obligations of the City under this Agreement, including all or any part of any payment or reimbursement, whether direct or contingent, will only extend to payment of monies duly and lawfully appropriated and encumbered for the purpose of this Agreement through the City's legally required budgeting, authorization, and appropriation process. Further, no government entity, by this Agreement, creates a multiple fiscal year obligation or debt either within or without this Agreement. The failure of any legislature to budget, authorize, appropriate, or encumber monies to pay any Assistance shall not constitute a breach by the City.
- I. No Obligation by the Business. This Agreement sets forth only the terms and conditions by and under which the City will provide Assistance to the Business. Nothing in this Agreement will constitute or be deemed an agreement by or obligation on the part of the Business to meet or comply with the terms and conditions except as a condition to the provision of Assistance. The failure by the Business to meet or comply with terms and conditions of this Agreement will relieve the City of its obligation to pay any Assistance related to such failure.

II. NOTICES

Except for routine communications, notices required under this Agreement and all other correspondence between the parties shall be directed to the following addresses (unless changed by written notice) and shall be deemed received when hand-delivered or three (3) days after being sent by certified mail, return receipt requested:

To the City:

City Manager
City of Commerce City
7887 E. 60th Avenue
Commerce City, Colorado 80022

To Business:

Brinshore Development, LLC
Attn: David Brint
1603 Orrington Ave, Suite 450
Evanston, IL 60201

III. GENERAL PROVISIONS

- A. Remedy for Erroneous Payment. The Business will refund any Assistance provided

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on the basis of erroneous information or clerical errors after the notice has been provided by the City and the cure period described under Section B has expired or after the Business independently discovers the error. The City may offset any such erroneous payments from any other Assistance payable to the Business. This remedy is in addition to any remedies available at law or in equity.

- B. Development Subject to Applicable Laws. Neither this Agreement nor the payment of any Assistance shall constitute a waiver of any law, regulation, or policy applicable to the Development.
- C. No Third-Party Beneficiaries. The Parties expressly understand and agree that enforcement of the terms and conditions of this Agreement and all rights of action relating to such enforcement shall be strictly reserved to the Parties, or their successors or assigns. The Parties expressly intend that any person other than the City and the Business, or their respective successors or assigns, shall be deemed to be only an incidental beneficiary under this Agreement, and will not have any right to seek payment of any Assistance or enforce any right under this Agreement.
- D. Governing Law, Jurisdiction and Venue, and Recovery of Costs. This Agreement shall be governed by the laws of the State of Colorado without regard to its conflicts of laws provisions. For all claims arising out of or related to this Agreement, the Business consents to the exclusive jurisdiction of and venue in the state courts in the County of Adams, State of Colorado. The Business waives any exceptions to jurisdiction because of residence, including any right of removal to federal court based on diversity of citizenship. If legal action is brought to resolve any dispute among the parties related to this Agreement, the prevailing party in such action shall be entitled to recover from the non-prevailing party reasonable court costs and attorney fees.
- E. Acknowledgement of Open Records Act. The Business acknowledges that the City is a public entity subject to the Colorado Open Records Act, C.R.S. § 24-72-201, et seq., and as such, this Agreement and related documents may be subject to public disclosure.
- F. Governmental Immunity Act. No term or condition of this Agreement shall be construed or interpreted as a waiver, express or implied, of any of the immunities, rights, benefits, protections or other provisions of the Colorado Governmental Immunity Act, C.R.S. §§ 24-10-101, et seq.
- G. No Partnership or Agency. Notwithstanding any language in this Agreement or any representation of warranty to the contrary, neither the City nor the Business shall be deemed or constructed a partner or joint venture of the other. Neither of the Parties shall be the agent of the other, and any actions taken pursuant to this Agreement shall be deemed actions as an independent contractor of the other.
- H. Rules of Construction. Neither party will be deemed to have drafted this Agreement. This Agreement has been reviewed by all Parties and shall be construed and interpreted according to the ordinary meaning of the words used so as to fairly accomplish the purposes and intentions of all Parties. No term of this Agreement will be construed or resolved in favor of or against the City or the Business on the basis of which party drafted the uncertain or ambiguous language. Where appropriate, the

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singular includes the plural and neutral words and words of any gender will include the neutral and other gender. Paragraph headings used in this Agreement are for convenience of reference and shall in no way control or affect the meaning or interpretation of any provision of this Agreement.

- I. No Waiver. The waiver of any breach of a term, provision or requirement of this Agreement, including the failure to insist on strict compliance or to enforce any right or remedy, shall not be construed or deemed as a waiver of: any subsequent breach of such term, provision or requirement or of any other term, provision or requirement; any right to insist on strict compliance with any term, provision or requirement; or any right to enforce any right or remedy with respect to that breach or any other prior, contemporaneous, or subsequent breach.
- J. Severability. A holding by a court of competent jurisdiction that any provision of this Agreement is invalid or unenforceable shall not invalidate or render unenforceable any other provision.
- K. Authority. Each party represents and warrants that it has taken all actions that are necessary or required by its procedures, bylaws or applicable law to legally authorize the undersigned signatory to execute this Agreement on behalf of the Parties and to bind the parties to its terms.
- L. Counterparts. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all such counterparts taken together shall be deemed to constitute one and the same instrument.
- M. No Assignment. Neither this Agreement nor any rights to receive payment under this Agreement shall be assigned by the Business, except for any assignment to the Business' lenders or other third party in the ordinary course of business with the City's prior written consent, which consent shall not be unreasonably withheld. Any attempted assignment in violation of this provision will be void, will not obligate the City to provide any Assistance to any other person or entity, and will relieve the City of any obligation to provide any Assistance to the Business.
- N. Entire Agreement; Modification. This Agreement, including the recitals, which are incorporated by reference, contains the entire agreement of the Parties relating to the subject matter of this Agreement and, except as expressly provided in this Agreement, may not be modified or amended except by a validly executed written agreement. All prior and contemporaneous agreements and understandings, whether oral or written, are superseded by this Agreement and are without effect to vary or alter any terms or conditions of this Agreement.

**[Remainder of this page intentionally left blank- signature page(s)
follow(s).]**

IN WITNESS WHEREOF, the City and the Business have caused this Agreement to be

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duly executed as of the Effective Date.

CITY OF COMMERCE CITY

Jason R. Rogers, City Manager

ATTEST:

Dylan A. Gibson, City Clerk

APPROVED AS TO FORM:

Sarah Geiger, Interim City Attorney

BRINSHORE DEVELOPMENT LLC

Signature

Printed Name

Title

ATTEST:

Title: _____

EXHIBIT A

DEVELOPMENT PLAN

EXHIBIT B

CONSTRUCTION SCHEDULE

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